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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 DANIEL KLEEBERG, et al.,

4 Plaintiffs,

5 v.

16 Civ. 9517 (LAK)

6 WENDY EBER, et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
September 21, 2021
9:45 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES

14 BROOK & ASSOCIATES, PLLC
15 Attorneys for Plaintiffs
BY: BRIAN C. BROOK

16 FARRELL FRITZ, P.C.
17 Attorneys for Defendants
BY: KEVIN P. MULRY

18 FRANK T. SANTORO

19 -and-

20 HERBERT LAW
Attorneys for Defendants
BY: JOHN HERBERT

21 ALSO PRESENT:

22 ALI L. KRAL, Paralegal
SAMANTHA SKORIAK, Paralegal

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1 (Trial resumed)

2 THE COURT: Good morning, everyone. We are ready to
3 start the defense case.

4 Mr. Mulry.

5 MR. MULRY: Your Honor, Frank Santoro.

6 We call Wendy Eber, the first witness for the defense.
7 WENDY EBER,

8 called as a witness by the Defendants,

9 having been duly sworn, testified as follows:

10 THE DEPUTY CLERK: Please state your name and spell
11 your last name for the record.

12 THE WITNESS: Wendy Eber, E-b-e-r.

13 THE DEPUTY CLERK: Thank you.

14 THE COURT: You may proceed.

15 MR. SANTORO: Thank you, your Honor.

16 DIRECT EXAMINATION

17 BY MR. SANTORO:

18 Q. Good morning, Wendy.

19 Wendy, prior to the trial, did you work with me to
20 prepare a declaration containing your direct testimony in this
21 case?

22 A. I did.

23 Q. You reviewed that statement carefully?

24 A. I did.

25 Q. You signed that statement?

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1 A. I did.

2 Q. When you signed that statement, you were swearing to the
3 truth of the contents of that statement, correct?

4 A. Yes.

5 Q. And do you reaffirm that statement today?

6 A. I do.

7 Q. I'm going to show you what's been marked for identification
8 as Defendants' Exhibit ZA.

9 If you can scroll to the end, please, Samantha.

10 Wendy, you've seen Defendants' Exhibit ZA. Is that
11 the statement we were just referring to?

12 A. Yes.

13 Q. Is that your signature on the page in front of you?

14 A. Yes.

15 MR. QUIJANO: OK. I would like to offer
16 Defendants' ZA into evidence, your Honor.

17 MR. BROOK: Plaintiffs have a number of objections,
18 which I e-mailed to the court last night. They are quite
19 voluminous. If the court wants me to recite them verbally,
20 I can do so.

21 THE COURT: No, but I don't like you e-mailing.

22 MR. BROOK: I apologize.

23 THE COURT: So file them.

24 MR. BROOK: I will file it on ECF, your Honor.

25 THE COURT: Received subject to the objections.

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1 (Defendant's Exhibit ZA received in evidence)

2 Anything else, Mr. Santoro?

3 MR. SANTORO: Yes, your Honor.

4 Since most of our exhibits are offered through
5 Ms. Wendy Eber's declaration, we would offer all of defendants
6 proposed trial exhibits into evidence at this time.

7 THE COURT: You're going to have to give me a list of
8 what you're offering through this witness.

9 MR. SANTORO: Sure, your Honor.

10 We're offering all of the exhibits contained on our
11 defendants' proposed trial exhibit list, which consists of
12 Exhibits A through XXXXX.

13 THE COURT: A through?

14 MR. SANTORO: Quadruple X. X as in X-ray.

15 THE COURT: X as in X-ray.

16 MR. SANTORO: The Y exhibit, Exhibit Y is actually a
17 multi-part exhibit, Exhibit Y1 through Y33, Y Hayes 1 to
18 Y Hayes 2, and Y Stein 1 to Y Stein 7.

19 THE COURT: All right. I'm sure there are objections,
20 right?

21 MR. BROOK: Yes, your Honor. As with the other
22 exhibit list, they were e-mailed to court, and I will file
23 those online, if I'm understanding your Honor's instructions
24 correctly.

25 THE COURT: Yes.

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1 The exhibits are received subject to the objections.
2 (Defendant's Exhibits A through XXXX, Y1 through Y33,
3 Y Hayes 1 through Y Hayes 2, Y Stein 1 and Y Stein 2 received
4 in evidence)

5 MR. SANTORO: Your Honor, thank you. I would like to
6 ask a few questions on some issues that came up on plaintiffs'
7 case on leave of the court.

8 THE COURT: OK.

9 BY MR. SANTORO:

10 Q. First, Wendy, I would like to talk about the consulting
11 agreement, Lester Eber's consulting agreement.

12 What kind of work did your father do for Southern Wine
13 & Spirits under the consulting agreement?

14 MR. BROOK: Objection, personal knowledge.

15 THE COURT: Sustained.

16 A. He --

17 MR. SANTORO: The objection is sustained.

18 THE COURT: Not appropriate. When I say "sustained,"
19 you stop, please.

20 Q. Wendy, when did your father begin working for Southern Wine
21 & Spirits?

22 MR. BROOK: Same objection.

23 THE COURT: Same ruling.

24 MR. SANTORO: Your Honor --

25 Q. Wendy, are you aware of the work your father did for

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1 Southern Wine & Spirits?

2 A. Yes, I am.

3 Q. How are you aware of it?

4 A. Because he was -- you know, I saw him and I talked to him
5 and I was around him. And I knew that he was going to Albany.
6 I knew he had an office at Southern. So I had spoken to him --

7 MR. BROOK: Objection, hearsay.

8 THE COURT: Certainly seems that way to me.

9 BY MR. SANTORO:

10 Q. Wendy, being around your father, can you tell me when he
11 first started working for Southern Wine & Spirits?

12 A. Sure. It was after --

13 MR. BROOK: Objection.

14 THE COURT: Sustained.

15 Q. Did your father maintain an office after August of 2007?

16 A. At Southern? Yes.

17 Q. OK. Where was that office located?

18 THE COURT: Excuse me. Were you present in it?

19 THE WITNESS: No.

20 THE COURT: OK. Whatever you know about any office he
21 had at Southern you know because he told you, is that right?

22 THE WITNESS: Well, he went there, yes.

23 THE COURT: And the reason you know that he went there
24 is he told you he went there, right?

25 THE WITNESS: Yes.

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1 THE COURT: OK. Answer stricken. Objection
2 sustained.

3 BY MR. SANTORO:

4 Q. Were you ever at that office, Wendy?

5 A. Yes.

6 Q. When did you visit that office?

7 A. When I interviewed for a job there.

8 Q. Where was it located?

9 A. I wasn't in his, per se, office. I was in their office.

10 Q. Where was -- and you're referring to Southern's office,
11 correct?

12 MR. BROOK: Objection, vague. I'm not sure who "their
13 office" is.

14 A. Southern's office.

15 MR. SANTORO: You have to wait for a ruling from the
16 judge.

17 THE COURT: Go on.

18 MR. SANTORO: I'm sorry, Judge.

19 THE COURT: Go on.

20 MR. SANTORO: OK.

21 BY MR. SANTORO:

22 Q. So when did you -- when were you in that office?

23 A. I would say, like, 2007, late 2007, maybe September or
24 something like that. October something.

25 Q. What year?

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1 A. 2007.

2 Q. OK. At the time you visited that office, was your father
3 there?

4 A. No, he was -- he was not there.

5 Q. OK. Now, were you aware of your father's consulting
6 agreement with Southern?

7 A. Yes, I was.

8 Q. How did you become aware of it?

9 A. I remember seeing it for the first time and printing it
10 out, so I was aware of it.

11 Q. OK. Did your father -- how long did your father work for
12 Southern?

13 MR. BROOK: Objection.

14 THE COURT: Sustained as to form.

15 Q. Well, other than your father telling you, was there any
16 other observations that you had that led you to believe that
17 your father worked for Southern?

18 A. Other people knew besides that. Besides my father, I had
19 conversations with other people. Our CFO, you know, Lisa
20 Semenik, Mike Gumaer, other people who were in the industry as
21 well.

22 MR. BROOK: Objection to testimony based on hearsay.

23 THE COURT: Sustained. Stricken.

24 Q. So following August of 2007, did you spend time with your
25 father?

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1 A. Yes.

2 Q. How often did you spend time with your father?

3 A. All the time. Weekly. I worked with him.

4 Q. OK. In what capacity did you work with him?

5 A. In winding down the New York business and also in
6 Connecticut, our Connecticut ...

7 Q. And what did he do with his time?

8 A. He split it. He was in -- he would travel to New York. He
9 lived in Rochester, New York. He would travel to New York, and
10 he would spend certain days in New York City and Long Island
11 working with Southern, and then he would come up to
12 Connecticut, and then he was in Albany.

13 MR. BROOK: Move to strike the part about Southern.

14 THE COURT: Yes, that is all stricken. No personal
15 knowledge.

16 Q. OK. Now, Wendy, there was some issue of Eber Wine &
17 Liquor's transaction with Southern in 2007 came up on
18 plaintiffs' case.

19 Can you tell me the proceeds of that transaction with
20 Southern?

21 A. Approximately 22 million.

22 Q. What happened to that money?

23 A. It all went to pay down the bank, Wells Fargo, and vendor
24 suppliers.

25 Q. OK. Harris Beach was performing work in connection with

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1 that transaction, right?

2 A. Yes.

3 Q. And, in fact, prior to -- well, what kind of work did
4 Harris Beach provide for the Eber entities?

5 A. They were lawyers.

6 Q. Who did they perform work for?

7 A. All the companies.

8 Q. To your knowledge, who was responsible for paying them?

9 A. All the companies.

10 Q. OK. Now, finally, briefly, I think your declaration states
11 in paragraph 83 that Lester Eber received 750 shares of class B
12 junior preferred stock of Eber Wine & Liquor in February 2017.

13 Can you tell me your understanding of why he received
14 that?

15 A. Yes. We were in the process of settling with the PBGC.
16 And from ERISA law, their rules, in order for him to waive his
17 benefit --

18 MR. BROOK: Objection to legal opinion.

19 THE COURT: I'm sorry?

20 MR. BROOK: Objection to legal opinion on ERISA. Most
21 lawyers don't understand that.

22 THE COURT: Objection sustained.

23 MR. SANTORO: I asked her for her understanding at the
24 time.

25 THE COURT: Yes, I know. What is her understanding in

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1 terms of relevance to the case?

2 MR. SANTORO: It goes to her state of mind in her part
3 in effectuating the transaction.

4 THE COURT: Is that an issue?

5 MR. SANTORO: I believe so, your Honor. I believe the
6 plaintiffs are attacking every action that Wendy Eber took
7 here.

8 THE COURT: Every action?

9 MR. SANTORO: That she took as an officer and director
10 of Eber Wine & Liquor.

11 THE COURT: So far I haven't heard of any actions she
12 took. So far what I'm hearing is that she had some awareness
13 of this transaction, and you're trying to elicit from her the
14 reason of some unknown person or persons as to why it was done.

15 MR. BROOK: Your Honor, it's true that plaintiffs
16 generally allege that this bad state of mind and not acting in
17 good faith throughout this case due to certain indemnification
18 provisions as it relates. As to this action, plaintiffs do not
19 challenge it based on anyone's state of mind. It has to do
20 with various corporate rules and trustee rules not being
21 followed.

22 THE COURT: I think that takes care of it.

23 Unless you can establish personal knowledge, there is
24 no more basic rule than that.

25 MR. SANTORO: I understand that, your Honor.

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Cross - w. Eber

1 BY MR. SANTORO:

2 Q. Wendy, did you have a part in the issuance of the
3 750 shares of class B junior preferred stock?

4 A. I believe so, yes.

5 Q. OK. So were you aware of it when it was happening?

6 A. Yes.

7 Q. And can you tell me your understanding of why it was done?

8 A. Yes. My father was waiving his right to his pension plan
9 benefit, the joint -- and survivor benefit. And in order to do
10 that, he had to be the beneficial owner of a majority of the
11 Eber Wine & Liquor corporation stock.

12 Q. OK.

13 (Counsel confer)

14 MR. SANTORO: Thank you, Wendy.

15 Thank you, your Honor.

16 THE COURT: All right. Thank you.

17 Cross-examination.

18 MR. BROOK: Just a little, your Honor. Just to be
19 clear also with my expectations, I was being sarcastic. I
20 apologize.

21 CROSS-EXAMINATION

22 BY MR. BROOK:

23 Q. Good morning, Ms. Eber.

24 A. Good morning.

25 Q. You remember me, I'm Brian the lawyer for the plaintiffs in

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Cross - w. Eber

1 this case, correct?

2 A. Yes.

3 Q. I deposed you on four separate days before today, correct?

4 A. Yes.

5 Q. Would you mind just speaking up a little bit when you
6 answer? It is actually very hard to hear you. Speak into the
7 microphone.

8 A. Yes.

9 Q. Thank you.

10 I just want to touch on some of the things you just
11 said to try to clarify it.

12 You said that you worked with Lester all the time
13 since 2007, correct?

14 A. I worked -- I worked with him, yes.

15 Q. You specifically used the words "all the time," did you
16 not?

17 A. Yes.

18 Q. But you never once saw him in any Southern Wine & Spirits
19 office during that time, correct?

20 A. No.

21 THE COURT: No, it's not correct, or no, you never saw
22 him there?

23 THE WITNESS: I never saw him in the Southern office.

24 THE COURT: Thank you.

25 Q. You said that all the companies were responsible for paying

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Cross - w. Eber

1 Harris Beach, is that right?

2 A. That's my understanding.

3 Q. And isn't it true that up until 2007, you were not in the
4 role of a chief financial officer with any Eber Brothers
5 company in New York, correct?

6 A. Correct.

7 Q. Since 2007, isn't it true that every Harris Beach bill that
8 was paid, was paid by Eber Brothers Wine & Liquor Corp.,
9 correct?

10 A. I don't believe so.

11 Q. Can you think of any examples where that didn't happen,
12 putting aside Lester himself buying Harris Beach's claims for
13 \$400,000?

14 A. He paid that claim. He paid that claim.

15 Q. OK. So besides that payment, is there any other time when
16 any entity besides Eber Brothers Wine & Liquor Corp. paid a
17 Harris Beach bill that you personally know about?

18 A. I don't recall.

19 Q. You said just in your last bit of testimony that Lester had
20 to be the beneficial owner of Eber Wine & Liquor's stock in
21 order for him to waive his pension benefit, is that correct?

22 A. No.

23 MR. SANTORO: Objection, your Honor.

24 THE COURT: I don't think that's what she said.

25 MR. BROOK: I must have misheard it again.

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Cross - w. Eber

1 Q. Can you please restate it, what it was exactly that you
2 said that he -- why it was he had to be a shareholder as part
3 of that settlement?

4 A. He --

5 MR. SANTORO: Objection, mischaracterizing the
6 testimony, your Honor.

7 THE COURT: Yes, I think that's true. Sustained as to
8 form.

9 Q. OK. I'll have to go back to the transcript then. I must
10 have misheard it.

11 All right. In your declaration, is it fair to say,
12 Ms. Eber, that you provided an extensive amount of financial
13 information about the Eber Brothers companies and their
14 affiliates?

15 A. Yes.

16 Q. Were you careful to ensure that the information you
17 included was accurate?

18 A. To the best of my ability, yes.

19 Q. Did you do it yourself?

20 A. Which specific?

21 Q. Well, there's a lot of financial information in your
22 declaration, correct?

23 A. There are references to financial statements and, yes, we
24 had a lot of financial statements in there. And we referenced
25 losses in Connecticut specifically, and then parts of the

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1 settlements.

2 Q. So you're saying you can read a financial statement and
3 pull information out of it correctly, is that right?

4 A. Yes.

5 Q. And that includes a profit and loss statement, or a P and
6 L, correct?

7 A. Yes.

8 Q. You can also take a look at, for example, a general ledger
9 for a company and determine whether information in there is
10 accurate when putting that into your statement, correct?

11 MR. SANTORO: Objection, your Honor. I'm not sure
12 what the question is.

13 THE COURT: Sustained.

14 Ms. Eber, I think I picked up somewhere in this
15 material that you have a master's degree in business
16 administration from the Simon School of Business at the
17 University of Rochester, is that right?

18 THE WITNESS: Yes.

19 THE COURT: Did you concentrate in any particular
20 area?

21 THE WITNESS: Finance and marketing.

22 THE COURT: Are you or are you not a CPA?

23 THE WITNESS: I am a non-practicing CPA, yes.

24 THE COURT: Non-practicing, but you have a license?

25 THE WITNESS: Yes, I do.

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1 THE COURT: All right. That's fine.

2 Let's go ahead.

3 What year did you get that MBA?

4 THE WITNESS: '95.

5 THE COURT: I was on the visiting committee of that
6 school, but much earlier. So I have a reasonable regard for
7 counsel, as you might expect.

8 BY MR. BROOK:

9 Q. As part of your declaration, you also provided a discounted
10 cash flow analysis or DCF, correct?

11 A. Yes, I did.

12 Q. And you believe that you were capable of reliably inputting
13 information into that calculation, correct?

14 A. I created it, yes.

15 Q. OK. Let's look at just the first couple of instances in
16 your testimony where you provide some numbers for the court.

17 Declaration page nine of the PDF paragraph 20.

18 You say here that Dan Kleeberg abandoned the business
19 and moved to Florida in 2007 while continuing to collect
20 \$10,000 a month consulting fee for more than a year and 7,500
21 per month afterwards.

22 Is that information correct?

23 A. I believe so, yes.

24 Q. How did you verify that information?

25 A. He had a contract or he had an agreement -- I think there

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1 was a bill somewhere I saw. And I believe there were payments
2 that were made to him and then it went down. I saw some
3 document that said that it went down.

4 Q. All right. So you did verify this information before you
5 put it in here, correct?

6 A. To the documents, yes.

7 Q. OK. Did you look at the general ledger for Eber Wine &
8 Liquor when doing that?

9 A. I -- I did look at the general ledger because I know it was
10 a document that was included in discovery. It's a very thick
11 document, so I don't recall every single entry into it.

12 Q. Let's pull up Exhibit 160 at page 62.

13 If you can blow out the sales expense figures, please,
14 Ali.

15 All right. If you're able to expand that. Great.

16 All right. Now we're looking at the sales expense
17 category for Eber Wine & Liquor, and this is a general ledger
18 that begins August 31, 2007, right after the Southern deal,
19 correct?

20 A. Yes.

21 Q. It goes all the way through the end of May 2012, does that
22 sound correct, in terms of what you provided to us?

23 A. I only see through ...

24 Q. I'll withdraw the question.

25 What we're looking at here is the sales expenses that

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Cross - w. Eber

were recorded on the general ledger that you provided and they end August 31, 2009, correct?

Bottom left corner.

A. Yes.

Q. All right. Do you see any payments in the amount of \$10,000 there?

A. No, I don't.

Q. Isn't it true, in fact, that the first payment in the highlighted section is for 15,000, which is two times \$7,500, correct?

A. Correct.

MR. SANTORO: Object as to foundation.

THE COURT: Overruled.

Q. All right. So you can see that there are \$7,500 payments until the last one seems to be November 30, 2008.

Do you see that?

2008, Ali.

A. Yes.

Q. Then it actually decreases into half, 3750, correct?

A. Yes, it does.

Q. According to this, Dan Kleeberg, in 2008, was paid \$7,500 a month for 11 months and 3750 for one month at the end, correct?

MR. SANTORO: Object, your Honor.

THE COURT: Sustained.

Q. Do you have any reason to believe that this is not the

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Cross - w. Eber

1 payment being made to Dan Kleeberg under the consulting
2 agreement?

3 A. I don't know. I mean, I didn't book these or put this
4 together. I was going from a document that I saw that --

5 Q. You were the chief financial officer of Eber Wine & Liquor
6 in 2008, correct?

7 A. Yes.

8 Q. You would have reviewed any 1099s that were issued to the
9 company for people working for Eber Brothers Wine & Liquor in
10 2008?

11 A. I don't recall doing that.

12 Q. Let's see if we can try to refresh your recollection with
13 Plaintiffs' Exhibit 310.

14 Just one moment.

15 All right. Now, showing you what is marked as
16 Plaintiffs' Exhibit 310, this appears to be a 1099 issued in
17 2008 for Eber Brothers Wine & Liquor Corp.

18 Do you see that?

19 A. Yes.

20 Q. Do you see that the total amount of non-employee
21 compensation paid to Dan Kleeberg was \$86,250?

22 A. Yes.

23 Q. So does that refresh your recollection that, in fact, Dan
24 Kleeberg was only paid \$7,500 a month for the first 11 months
25 of 2008?

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1 MR. SANTORO: Object, your Honor.

2 THE COURT: Overruled.

3 Q. Does that refresh --

4 A. I'm sorry.

5 Q. Does that refresh your recollection that Dan Kleeberg was
6 not paid \$10,000 a month?

7 A. This document says that he wasn't, so ...

8 Q. OK. You can take that down.

9 A. He -- yeah.

10 THE COURT: Just give me that figure again. 86,250,
11 was it?

12 MR. BROOK: I believe that's right, your Honor.

13 THE COURT: That squares to the penny with --

14 MR. BROOK: Exhibit 160.

15 THE COURT: -- exhibit 160, page 62?

16 MR. BROOK: Yes, your Honor.

17 THE COURT: All right.

18 BY MR. BROOK:

19 Q. Now, let's look at the next bit of financial information
20 you have in your paragraph 24 of your declaration.

21 All right. Here, I'm not looking to read the whole
22 thing. Just looking at the second sentence, you provide
23 information for the net income for Eber Wine & Liquor in 2005
24 and 2006, correct?

25 A. Yes.

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1 Q. And you would have gotten this information from the P and L
2 statement as part of Eber Wine & Liquor's financial statement,
3 correct?

4 MR. SANTORO: Object, your Honor.

5 THE COURT: Objection to the form and sustained.

6 Q. All right. Where did you get this information from?

7 A. The financial statement ending 2005 and 2006.

8 Q. OK. So that exhibit is already in as Exhibit 205.

9 Ali, could you please put up Exhibit 205, maybe
10 alongside this one, I believe it's -- I can't remember if it is
11 page six or exactly where. Page seven of Exhibit 205. Then if
12 we can go back to paragraph 24 and put that there on the left.

13 All right. So you see that, in fact, the net
14 income -- the net income --

15 If you can actually zoom in, Ali, from other income
16 expenses in the middle all the way down to the bottom. Great.
17 Put that on the side so it is not blocking the other one.
18 Great.

19 All right. When you said that there was approximately
20 29 million in income in 2005, you were actually reading the net
21 other income, correct, not the net income?

22 A. The net income on the bottom line here. Sorry.

23 Q. Oh, the net income here is for 2005 is clearly \$20,362,231,
24 correct?

25 A. Yes.

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1 Q. All right. The number that you provided in your statement
2 was approximately 29 million, correct?

3 A. Yeah. Can I see -- what does it say on top? Yeah. Yeah,
4 it's before the -- before minority interest and other things,
5 yes.

6 Q. So and then --

7 A. You can't really see what this says here.

8 MR. BROOK: Ali, close the callout on the right so she
9 can see the whole document.

10 A. Other income and expenses, yes. Yes, the bottom line is 20
11 and nine.

12 Q. I'm sorry. You're saying it is 20, not 29?

13 A. Well, you're saying the bottom -- you're saying the net
14 income in 2005 was 20?

15 Q. Yes.

16 A. And then the loss was in 2006.

17 Q. Then the loss in 2006 was \$9,134,000 and change, not
18 12.7 million, correct?

19 A. Correct.

20 Q. And it looks like, in this instance, you misread which part
21 of the financial statement was the net income, is that correct?

22 A. Yes.

23 MR. BROOK: All right. You can take that down, Ali.

24 Just one second.

25 (Pause)

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1 THE COURT: Let's just pause for a moment so that I
2 get what, I take it, you now both agree are the correct
3 figures.

4 Put up the exhibit again.

5 MR. BROOK: Page seven.

6 THE COURT: It does not, does it, show the sales
7 figure, right, refer to the first sentence of paragraph 24 of
8 the witness statement, am I right?

9 MR. BROOK: Let's see. I don't have the witness
10 statement right here.

11 THE COURT: Oh, I see. There we are.

12 So the 2005 sales figure in the statement is
13 approximately correct. It is approximately correct for 2006
14 also.

15 MR. BROOK: Yes.

16 THE COURT: The net income figure for 2005 is about
17 20 million and the net loss the following year was about
18 9.1 million, and that's what it amounts to; yes?

19 MR. BROOK: Yes, your Honor.

20 THE COURT: OK.

21 BY MR. BROOK:

22 Q. Just to be clear, so, Ms. Eber, by just looking at the
23 other income information, that does not include any of the
24 operating income or sales, correct?

25 A. I'm sorry?

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1 Q. Other income as a category, excludes operations, does it
2 not?

3 A. Yes. You've got to go up, yeah. Right, so the other
4 expenses.

5 Q. Right.

6 THE COURT: Ms. Eber --

7 THE WITNESS: Operations and then other income
8 expenses.

9 THE COURT: Ms. Eber, what was the net loss from
10 subsidiary in 2006?

11 THE WITNESS: I'm not sure where you're referring to.
12 I don't see that.

13 MR. BROOK: It's been highlighted.

14 THE WITNESS: What was that? I don't know. I didn't
15 put these financial statements together, your Honor. I was not
16 involved in the production of this statement.

17 THE COURT: This precedes the time when you were chief
18 financial officer?

19 THE WITNESS: Yes.

20 THE COURT: OK. Thank you.

21 BY MR. BROOK:

22 Q. Is it correct that you did not actually become a chief
23 financial officer of Eber Brothers until after Lisa Semenik
24 resigned in October 2007?

25 A. Correct.

L9LsKLE1

Cross - w. Eber

1 Q. And you were also not a board member of Eber Wine & Liquor,
2 Eber-Metro, or Eber-Connecticut until Lisa Semenik resigned in
3 October 2007, correct?

4 A. Correct.

5 Q. All right. Some of the things that happened --

6 Keep up Exhibit 205. We're going to go back to that
7 shortly.

8 You testified about Lester Eber's alleged loans in
9 2002 and 2005 in your declaration, correct?

10 Do you want us to go there to refresh your
11 recollection of what you said about those loans?

12 A. I'm sorry?

13 Q. Did you not testify about loans that Lester, your father,
14 purportedly made in 2002 and 2005?

15 A. Footnoted in footnote nine.

16 Q. Footnote nine of this financial statement?

17 A. Yes.

18 Q. OK. Let's go to page 18, I believe it is, of the exhibit
19 or the PDF.

20 This is talking about the long-term debt. So it is
21 your understanding that that first set of numbers of unsecured
22 non-interest bearing note payable to an officer with no set
23 repayment date refers to loans that your father made, is that
24 right?

25 A. Yes.

L9LsKLE1

Cross - w. Eber

1 Q. And you've testified to that even though you were not
2 involved in the chief financial officer function at the time,
3 correct?

4 A. I was not chief financial officer at the time.

5 Q. And you did not have any bank records or canceled checks
6 indicating that Lester Eber ever made any payments to the
7 company around the time of these purported loans, correct?

8 A. I didn't have those, but the -- no, I don't have those.

9 Q. And you searched for them in response to the discovery
10 requests in this case, correct?

11 A. Yes.

12 Q. And you could not find any such evidence of payments being
13 made by Lester in that time period, correct?

14 A. There were some checks. We couldn't find them.

15 Q. You say there were some checks, but you couldn't find them?

16 A. Yes, there were checks. We couldn't find them.

17 THE COURT: How do you know that?

18 THE WITNESS: He -- he had bank records where he was
19 trying to find a specific check and couldn't find them.

20 THE COURT: So when you say there were some checks,
21 what I'm understanding you to be saying is that there were,
22 generally speaking, all sorts of checks and that you or someone
23 under your supervision went through them and you couldn't find
24 any checks that reflected payments by your father into the
25 company, is that accurate?

L9LsKLE1

Cross - w. Eber

1 THE WITNESS: At this time period, yes.

2 THE COURT: At this time period?

3 THE WITNESS: These. These, I don't have.

4 THE COURT: OK. Thank you.

5 THE WITNESS: There is --

6 THE COURT: Go ahead. I don't mean to cut you off.

7 THE WITNESS: He did with the CFO. There is a note
8 payable that was signed.

9 THE COURT: Well, who signed the note payable?

10 THE WITNESS: The CFO.

11 MR. BROOK: Why don't we put them up on the screen so
12 we're all on the same page, your Honor.

13 THE COURT: OK.

14 MR. BROOK: Let's start with Defense Exhibit K.

15 A. These were audited by the auditors.

16 Q. So you're saying that these were -- you know that this
17 Exhibit K and the other note for \$575,000, Exhibit L, were
18 received by the auditors, is that right?

19 A. What I'm saying is that the auditors put together the
20 financial statement and they audit the financial statement.

21 Q. OK. Isn't it true that there can be many different reasons
22 why someone is given a promissory note besides that person, the
23 recipient, having loaned money to the maker, correct?

24 MR. SANTORO: Objection, your Honor.

25 THE COURT: Overruled.

L9LsKLE1

Cross - w. Eber

1 A. I don't know.

2 Q. Let me look at this.

3 THE COURT: Can I get a moment of clarification here?

4 The financial statements, if I remember correctly, are
5 exhibit?

6 MR. BROOK: 205.

7 THE COURT: 205.

8 MR. BROOK: Page 18 of the PDF refers to certain
9 notes.

10 THE COURT: Would you turn to the auditor's report
11 there on the financial statement?

12 MR. BROOK: You're talking about the opinion, the
13 signed opinion? I'm sorry.

14 THE COURT: The opinion.

15 MR. BROOK: Page three, I believe.

16 THE COURT: Ms. Eber, is there any way of telling from
17 Plaintiffs' Exhibit 205 whether the auditors ever saw checks
18 from your father for the loans we've just been discussing to
19 the company?

20 THE WITNESS: I don't have knowledge of that.

21 THE COURT: Is it correct that we have no way of
22 knowing that they verified the existence of the payable to your
23 late father, that's referred to in footnote nine, beyond
24 looking at the notes, is that true?

25 THE WITNESS: I don't know what their procedure is. I

L9LsKLE1

Cross - w. Eber

1 was not involved in the production of --

2 THE COURT: That's simply what I'm trying to
3 establish.

4 THE WITNESS: Yeah.

5 THE COURT: Just so that I understand what the
6 evidence shows and doesn't show. OK.

7 (Continued on next page)

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L9L2Kle2

W. Eber - Cross

1 BY MR. BROOK:

2 Q. I think there may be a way to see whether the auditors even
3 saw these notes. Ali, would you please pull up Exhibit K
4 again. Zoom in on the second paragraph.

5 All right. Looking at the last line, do you see,
6 Ms. Eber, it says that there is interest at a rate of 6
7 percent, crossed out, by Lester Eber only, and raised to 9
8 percent from the date of the original note until paid?

9 Correct?

10 A. Correct.

11 Q. And the original note -- just to pull it back out, Ali, the
12 first paragraph says that was August 15, 2005, correct?

13 A. Sorry. Are you --

14 Q. That says that the original note was August 15, 2005,
15 right?

16 A. Yes.

17 Q. And the date of this amended and restated note is March 13,
18 2006, correct?

19 A. Yes.

20 Q. So that is before the fiscal year end of May 31, 2006
21 reflected in the financial statement we were just looking at,
22 correct?

23 A. Yes.

24 MR. BROOK: And so let's go back, Ali, and let's take
25 a look at Exhibit 205.

L9L2Kle2

W. Eber - Cross

1 THE COURT: Before you back up, could I please see who
2 signed the note.

3 MR. BROOK: Oh, yes, your Honor.

4 THE COURT: Okay. Thank you.

5 BY MR. BROOK:

6 Q. We can see that this is dated as of the 13th day of March,
7 correct?

8 THE COURT: I read that as "12th."

9 MR. BROOK: Oh.

10 THE COURT: It could be either.

11 MR. BROOK: Either way. Doesn't make a difference.

12 Let's now go back to Exhibit 205 at page 18 of the
13 PDF. Let's look at that related party debt description again.

14 Q. Do you see that the auditors described the note as being as
15 noninterest-bearing note payable --

16 A. It's a mistake.

17 Q. How do you know that?

18 A. Because it was interest bearing, and the only officer that
19 was lending money, they had, you know --

20 Q. You had no personal knowledge that this was a mistake
21 rather than simply an instance where a note was backdated to a
22 date before the date of an audit, do you?

23 MR. SANTORO: Objection, your Honor.

24 THE COURT: Overruled.

25 A. Sorry. Can you repeat the question?

L9L2Kle2

W. Eber - Cross

1 Q. Yes. You have no personal knowledge that this was a
2 mistake by the auditors rather than an instance where a note to
3 your father was backdated to a date before the date of the
4 audit.

5 MR. SANTORO: Just objection.

6 THE COURT: Overruled.

7 A. I am saying that it is an interest-bearing note. What I am
8 saying is the description here is incorrect. But I don't have
9 any knowledge about back -- I don't understand your question
10 about backdating.

11 Q. I am just asking --

12 A. I am just saying it is an interest-bearing note. This
13 description is incorrect. So --

14 THE COURT: Well, we know that Exhibit K and Exhibit
15 L, by their terms, are interest-bearing. The point of
16 counsel's question is, it is possible that those two pieces of
17 paper didn't exist within the audit period, is it not?

18 THE WITNESS: No.

19 THE COURT: Well, did you see them within the audit
20 period yourself with your own eyes?

21 THE WITNESS: No.

22 THE COURT: Okay.

23 MR. BROOK: Let's look at one more thing. Ali, could
24 you possibly leave that up and then put by the side of it the
25 Defense Exhibit L. Sorry, let's do on the left. I wanted to

L9L2Kle2

W. Eber - Cross

1 have Exhibit 205, page 18 . . .

2 BY MR. BROOK:

3 Q. Now, Exhibit L is another promissory note dated March 13,
4 2006, the same day as Exhibit K, correct?

5 A. Yes.

6 MR. BROOK: And just, Ali, if you can, zoom out for a
7 second and just scroll the second page on the right document.

8 Q. See this is also signed by Lester Eber and John Ryan,
9 correct?

10 A. Yes.

11 Q. Zoom back out. Let's go back to the first page. And let's
12 zoom in on the first paragraph and the number in the upper
13 left.

14 All right. So this is saying, this is amended and
15 restated promissory note replacing a note dated October 1,
16 2002, correct?

17 A. Yes.

18 Q. And it is saying that the amount due as of March 13, 2006
19 is \$575,895 on that 2002 note, correct?

20 A. Yes.

21 Q. Now let's again move that blow up and let's blow up the
22 related party debt line on the left. Get the date on that the
23 year above that, too. No, no, no, just the years 2005 and '6.
24 There we go.

25 All right. So the auditors, according to their

L9L2Kle2

W. Eber - Cross

1 report, as of May 31, 2005, the amount of debt owed to your
2 father was \$263,571, correct?

3 A. Yes.

4 Q. And so that is your understanding that reflects the balance
5 as of that date on the 2002 note referenced in Exhibit L,
6 correct?

7 A. I wasn't there, but that's what the document says.

8 Q. And you have no idea why your father and Lester Eber would
9 be restating a promissory note that had already been paid off
10 by nearly half at a higher number, do you?

11 MR. SANTORO: Objection, your Honor.

12 MR. BROOK: I will withdraw the question.

13 You can take that down, Ali.

14 BY MR. BROOK:

15 Q. Now in 2005, you were living and working primarily in New
16 York City, correct?

17 A. Yes.

18 Q. So you were working for the Eber-Metro entity primarily, is
19 that right?

20 A. Yes.

21 Q. And is it correct also that at some point your father
22 wanted you to get experience in Albany, so you started working
23 with Dan Kleeberg on that?

24 A. Well, as we -- we lost a lot of employees and then I moved
25 into a sales position, sales management position at some point,

L9L2Kle2

W. Eber - Cross

1 you know, like 2005, '6, like that.

2 Q. So you were -- because you were working in the New York
3 metro area, you were aware of the merger or acquisition of part
4 of Eber-Metro by MDC, the Georgia-based distributor, correct?

5 A. Yes.

6 Q. And that was a deal that Lester Eber helped bring about
7 himself, correct?

8 A. Yes.

9 Q. And are you aware that the board of directors actually
10 passed a resolution thanking Lester for having brought that
11 deal about?

12 A. I don't recall.

13 MR. BROOK: Okay. Let's put up Exhibit 25. This is
14 not yet in evidence but I believe there is no objection.
15 Plaintiffs go ahead and offer Exhibit 25.

16 MR. SANTORO: No objection.

17 THE COURT: Received.

18 (Plaintiff's Exhibit 25 received in evidence)

19 MR. BROOK: Let's flip to the second page, the bottom
20 paragraph there.

21 BY MR. BROOK:

22 Q. And you see that that says that, "The board is authorizing
23 the corporation to pay Lester Eber a commission in the amount
24 equal to \$1,500,000 as consideration for all of his efforts
25 relating to the consummation of the transaction, including, but

L9L2Kle2

W. Eber - Cross

1 not limited to, identifying NDC as a partner and negotiating
2 all of the terms and conditions of the transaction."

3 Do you see that?

4 A. Yes.

5 Q. And it was in your testimony, I believe, that you said that
6 Lester never got paid that amount, is that right?

7 A. I didn't testify to that.

8 Q. Okay.

9 A. I don't . . .

10 Q. To your knowledge, was Lester ever paid that \$1,500,000 as
11 a commission?

12 A. I don't know, I . . .

13 MR. BROOK: Ali, why don't we go to the first
14 comparison that I had you pull up.

15 THE COURT: What's the date of this document, counsel?

16 MR. BROOK: Oh, that's exactly where I am going to, so
17 it is dated, according to the page, of May 31, 2005.

18 THE COURT: Okay.

19 MR. BROOK: However, there is one signature missing
20 there.

21 Q. Do you see that, Wendy?

22 A. Yes.

23 Q. Okay. Let's go to the next page and take a look at when
24 Mr. Gumaer signed it. Can you go to the top there, fax line.
25 All right. So that says September 19, 2005.

L9L2Kle2

W. Eber - Cross

1 Now let's compare that against the date of the
2 original supposed promissory note that was issued to Lester.
3 Actually I think we are just looking at the numbers right now.
4 Let's go to the next comparison, Ali.

5 So as part of your work trying to determine the amount
6 that Lester had loaned, did you look into whether the
7 promissory note was just a way of paying Lester that wouldn't
8 get as much scrutiny from Wells Fargo, the lender?

9 MR. SANTORO: Objection, your Honor.

10 THE COURT: Overruled. Answer if you know.

11 A. What was the question? Sorry.

12 Q. If in the course of trying -- let's step back.

13 You have done a lot of work over the years trying to
14 compile different loans that Lester made and other payments
15 that he made in order to try to make sure that he got credit
16 for that, correct?

17 A. Yes.

18 Q. And in the course of that work, did you ever investigate
19 whether the promissory note that was apparently originally
20 dated August 15, 2005, was in fact in lieu of a payment of a
21 commission to Lester for the NDC deal?

22 A. And what was the question if I --

23 Q. Did you ever look into that possibility?

24 A. I don't recall, you know, looking into that. I mean, I
25 believe I spoke with Sumner Pearsall, our tax accountant, about

L9L2Kle2

W. Eber - Cross

1 these loans, but I don't have specific knowledge.

2 MR. BROOK: Move to strike the portion about speaking
3 with Sumner Pearsall to the extent it implies support for her
4 testimony.

5 I will withdraw. Sorry. Overkill.

6 You can take that down, Ali.

7 BY MR. BROOK:

8 Q. Let's talk a little bit more about Exhibit L. That's the
9 \$575,000 note. When did you find this document?

10 A. I don't recall.

11 Q. Isn't it correct that you -- well, let's step back.

12 So you recall that there was a meeting of the trustees
13 of the Allen Eber Trust on August 18, 2011, to discuss Lester's
14 loans, correct?

15 A. I believe so, yes.

16 Q. And you were present for that meeting, correct?

17 A. Yes.

18 Q. And you in fact prepared --

19 A. Either there or by phone.

20 Q. You prepared the minutes of that meeting, correct?

21 A. Yes.

22 Q. And isn't it true that during that meeting to discuss
23 Lester's loans in fact only two loans were ever discussed and
24 supposedly ratified.

25 A. I'm not looking at the meeting minutes, but there were two

L9L2Kle2

W. Eber - Cross

1 that were outstanding. There were the old loans and the new
2 loans.

3 Q. Let's take a look at Exhibit 234 in evidence. Let's go to
4 the top. Actually ignore that.

5 Just so we are clear, this is -- the top e-mail here
6 is you forwarding an e-mail from 2011 to someone named Maria
7 Soeffing, if I am saying that right. Who is she?

8 A. Doesn't she work for a law firm?

9 Q. So it's your understanding she was Underberg & Kessler's
10 paralegal, is that right?

11 THE COURT: I couldn't understand you, counsel.

12 Q. She was Underberg & Kessler's, your former law firm's,
13 paralegal, is that right?

14 A. I believe so.

15 Q. So let's go to the second page. Let's first go to the
16 third page, Ali. It was -- let's zoom in on the bottom two
17 parts.

18 So is it correct that on about September 16, 2011, you
19 e-mailed minutes to a trustee meeting dated August 18, 2011, to
20 Glenn Sturm at two different e-mail addresses and copying your
21 father?

22 A. Yes.

23 Q. And in response to that, your father said, about two hours
24 later, "okay." Do you see that?

25 A. Yes.

L9L2Kle2

W. Eber - Cross

1 Q. Let's take a look at those minutes on page 2 of the
2 exhibit, Ali. Can you blow up the second and third paragraphs.
3 Actually include the first. Let's do that.

4 All right. The first paragraph refers to who was
5 present for this meeting or participated by phone, correct?

6 A. Yes.

7 Q. Is that yes?

8 A. Yes.

9 Q. All right. You don't mention yourself here, is that right?
10 Oh. I'm sorry. You do. You say, "Wendy Eber was present to
11 facilitate and document the discussion," last line of that
12 paragraph. Do you see that?

13 A. Yes.

14 Q. But you don't mention Glenn Sturm, do you?

15 A. No.

16 Q. So the person you were sending these minutes to on
17 September 16 was not present for that meeting, is that a fair
18 assumption?

19 A. I'm not sure. He may have been. I --

20 Q. Well --

21 A. It's not in this memo, but he may have been participating
22 by phone.

23 Q. Let's look at now the substance of the meeting. The very
24 next line says the trustees ratified two loans made by Lester
25 Eber to Eber Brothers Metro, Inc., and it says that the first

L9L2Kle2

W. Eber - Cross

1 loan was from October 2009, that was assumed by Metro in 2010,
2 and that's -- just to cut to the chase, that's the line of
3 credit note for \$1.5 million, correct?

4 A. Yes.

5 Q. And then it says the second loan, for March 16, 2006, is an
6 obligation for the principal amount of \$1,503,750, now looking
7 at the third paragraph. We are highlighting the wrong thing
8 here. Do you see that?

9 A. Yeah, and the second loan, sorry.

10 Q. And if you need a second to answer this you can, but there
11 is no reference to any \$575,000 and change note from March
12 2006, is there?

13 A. No. I think they were consolidated, though. It was, as I
14 recall, how they were put together. There were the old loans
15 and then the new ones. The new ones were the line of credit,
16 which was, you know, 1.5 million.

17 Q. Okay. Let's look and see how these minutes changed after
18 you send them to Glenn Sturm. Pull up Exhibit 19, please. And
19 let's look at the second and third paragraphs again.

20 Do you see that now it says the trustees ratified
21 three loans instead of two?

22 A. Yes.

23 Q. And it now refers to a third loan of \$575,895 in the second
24 sentence of the third paragraph of this document, correct?

25 A. Okay. It replaces the original one dated October 1, so

L9L2Kle2

W. Eber - Cross

1 there was another one, too, from October 1, 2002, as well, and
2 they got consolidated.

3 Q. Well, let's -- that's the same note as the \$575,895,
4 Exhibit L, we were just looking at a few minutes ago, right?

5 A. Well, there was another one I think October 1, which this
6 says, which replaced the original note dated October 1, 2002.

7 Q. Let's pull up Exhibit L, just so that we can clear up this
8 confusion, and zoom in on the first paragraph of that.

9 Do you see there that it is that \$575,000 and change
10 note that replaces in its entirety the promissory note dated
11 October 1, 2002? So we are talking about the same thing,
12 right?

13 A. Yes.

14 Q. Now, as of -- you are currently president of Eber Brothers
15 Wine & Liquor Corp., correct?

16 A. Yes.

17 Q. And you have been an officer or director of that company
18 most of the time since 2008, is that fair to say?

19 A. During the relevant periods, yes.

20 Q. Except for a period of time in around 2014 or 2015 when the
21 entire board of directors resigned, correct?

22 A. Because we didn't have insurance, yes.

23 Q. And most recently, and we will talk about this more later,
24 you actually amended the bylaws for Eber Wine & Liquor earlier
25 this year, correct?

L9L2Kle2

W. Eber - Cross

1 A. Yes.

2 Q. So is it fair to say that you were familiar with the bylaws
3 of Eber Wine & Liquor as they existed before the amendment?

4 A. It's a document that I had seen before, yes.

5 Q. And isn't it true that, according to the bylaws that were
6 in place in 2002 through 2006, the company was prohibited from
7 contracting any loans without board authorization?

8 A. Sorry. Can you repeat that?

9 Q. Isn't it true that Eber Brothers Wine & Liquor was
10 prohibited from contracting any loans, taking any loans from
11 anyone without board authorization?

12 A. I -- I wasn't aware of that. I mean, I -- I didn't -- I
13 don't know if I have read them that carefully. I thought
14 the --

15 Q. Let's pull up Exhibit 108 at page 10.

16 A. The will authorized loans.

17 Q. I have not asked you any questions about the will,
18 Ms. Eber.

19 Let's do, yeah, number 2 there, under finance. Do you
20 see that, it says at the top of what's blown up, "No loans
21 shall be contracted on behalf of the corporation, and no bonds
22 or notes shall be issued, unless authorized by the board or
23 made by properly designated officers as shown on the corporate
24 borrowing resolution"?

25 A. I'm reading that.

L9L2Kle2

W. Eber - Cross

1 Q. And isn't it true that you have never found any corporate
2 borrowing resolution authorizing Lester to loan any money to
3 any Eber Brothers company prior to February 2010?

4 A. I don't know.

5 Q. You don't know whether -- I'm just asking whether you found
6 one?

7 MR. SANTORO: Objection, your Honor. She answered the
8 question already.

9 THE COURT: I think so.

10 MR. BROOK: Okay.

11 I know there had been some concerns about water breaks
12 for the witness. I know I could use one. Could we take five
13 minutes, your Honor?

14 THE COURT: I can't make out what you are saying.

15 MR. BROOK: There has been some concern about getting
16 water breaks, to step outside for the witness, and I know I
17 could use one. Can we take five minutes, your Honor?

18 THE COURT: Okay. We will take ten minutes.

19 (Recess)

20 THE COURT: Okay. Let's continue.

21 BY MR. BROOK:

22 Q. Now, after Southern and Eber Brothers reached their deal in
23 2007, there was a significant amount of winding up that had to
24 happen in New York from that point forward, correct?

25 A. I wouldn't characterize it as them reaching a deal. Eber

L9L2Kle2

W. Eber - Cross

1 Brothers went out of business.

2 Q. Well, Eber Brothers signed no fewer than 15 different
3 agreements with Southern Wine & Spirits in August 2007,
4 correct?

5 A. It was out of business.

6 Q. I'm just asking if it signed the agreements. Is that
7 correct?

8 A. After it went out of business, yes. And then it was --

9 Q. And then after that point, Eber Brothers continued to have
10 to sell liquor and do other things to try to wind up its
11 business in New York, correct?

12 A. By August of 2007, there was -- a liquidator had come, so
13 it was -- had sold all of its inventory. It was out of
14 business.

15 Q. Isn't it true that, in connection with the winding-up
16 process, that Lester Eber spent substantially all of his work
17 week in the New York City area during the 2008 fiscal year?

18 A. I don't -- I don't know. I mean . . .

19 Q. You don't know if that's true or not?

20 MR. SANTORO: Objection, your Honor. She asked the
21 question -- she answered the question that was asked.

22 THE COURT: Proceed.

23 MR. BROOK: Let's pull up Exhibit 267 and go to page
24 5.

25 I will represent that this is a very large document

L9L2Kle2

W. Eber - Cross

1 that is a waiver for the minimum funding of pension
2 requirements in 2000 -- can you pull that down, Ali? It's a
3 little bit high, blocking the top part. It's a declaration for
4 2008.

5 Q. Do you see that?

6 A. Yes.

7 Q. And you remember signing this document under penalty of
8 perjury?

9 A. Yes.

10 Q. Okay. Let's --

11 A. I thought it was for --

12 Q. -- take a look at page 275 of the document. And I am
13 actually -- so just looking above the line first, so this is a
14 page that shows how much money was paid to different executives
15 for Eber Brothers Wine & Liquor for different fiscal years,
16 2006 through 2009, correct?

17 A. Yes.

18 Q. And fiscal year 2008, just so we are on the same page, that
19 would be June 1, 2007 through May 31, 2008, correct?

20 A. Sorry, which fiscal year?

21 Q. Fiscal year 2008 began on June 1, 2007, correct?

22 A. Yes.

23 Q. And ended May 31, 2008, correct?

24 A. Yes.

25 Q. So in that time period, according to this document, Lester

L9L2Kle2

W. Eber - Cross

1 was paid \$141,404 by Eber Wine & Liquor, correct?

2 A. I don't -- I know at some point they moved to the payroll,
3 yeah, I assume so.

4 MR. BROOK: Okay. There is a footnote there, footnote
5 2. Ali, would you please zoom in on footnote 2. It's the
6 second. There you go.

7 Q. And do you see that footnote 2 says that this amount does
8 not include payments in an aggregate amount equal to \$12,816
9 made to Mr. Eber for apartment maintenance in New York City.
10 These payments were required as the wind-up of the New York
11 City operation required Mr. Eber to spend substantially all of
12 his work week in the New York City area during the 2008 fiscal
13 year.

14 Do you see that?

15 A. I do.

16 Q. And that was part of the submission that you gave to the
17 IRS, correct?

18 A. Apparently it was.

19 MR. BROOK: You can close that, Ali.

20 A. I don't think that's an accurate statement.

21 Q. Well, actually, let's go ahead, pull up Exhibit 267 at 276
22 while we are looking at it. Sorry. That's confusing page 276
23 of 267.

24 So this is the page after the one we were just looking
25 at. Can you zoom in on the top half of that, Ali.

L9L2Kle2

W. Eber - Cross

1 So this is showing that during those same years there
2 were payments made to at least some of the same executives, you
3 and your father, from Eber-Connecticut, correct? That's the
4 first line compensation paid by Eber-Ct?

5 A. Yes.

6 Q. So in fiscal 2008, Lester was also paid \$195,272 by
7 Eber-Ct, correct?

8 A. Which fiscal year? Because, you know, I'm not sure where
9 these numbers are coming from. But on a W-2, that would be for
10 a different fiscal year than the fiscal year of the company.

11 THE COURT: What was the company's fiscal year?

12 THE WITNESS: It's May 31.

13 THE COURT: And right there on the page it says "for
14 the year ended May 31," does it not?

15 THE WITNESS: Okay, yes.

16 THE COURT: Okay.

17 BY MR. BROOK:

18 Q. Right. So just to clarify what you were saying, you are
19 referring to the fact -- and this is apparent in some
20 documents, your Honor -- that when you say fiscal year 2009,
21 the IRS in its forms would call that fiscal year 2008, correct?

22 A. '8. Yes. It's confusing. And I have --

23 Q. Because you count from when the year ended and the IRS
24 counts from when the year began, correct?

25 A. Yeah, it's always a year back.

L9L2Kle2

W. Eber - Cross

1 Q. Now, for the year of 2008, you were paid -- now I am
2 talking calendar year, you were paid by both Eber Brothers
3 Wine & Liquor and Eber-Connecticut, correct?

4 A. Well, this shows Connecticut, yes, and -- did the other
5 one? I can't remember what the other dates were on the other
6 one.

7 Q. Let's look at the W-2s so we can stay focused on the
8 calendar year. That's Exhibit 158. We are going to be looking
9 at the first and second pages, I believe.

10 So 2008 is in the middle there. So do you see that
11 that shows that you were paid by Eber Wine & Liquor 50,834 in
12 2008?

13 A. Yes.

14 Q. Is that a yes?

15 A. Yes.

16 Q. And as a general matter, if you could please try to speak
17 up or speak into the microphone, it's very hard to hear you
18 from back here.

19 Okay. If you could go to the next page, please, Ali,
20 and at the bottom half. If you can scroll down.

21 And this shows that in the same calendar year 2008,
22 you were paid, inclusive of 401K contributions, \$81,517 and
23 change, correct?

24 A. \$78,000.

25 Q. Well, you know what -- looking in the middle right side

L9L2Kle2

W. Eber - Cross

1 there, you see box 12A, code D, that refers to 401K
2 contributions, does it not?

3 A. Okay.

4 Q. And you see that those are counted towards Medicare and
5 Social Security depending on the amount, correct?

6 A. Yes.

7 Q. All right.

8 Now, for your father, you have only provided us with
9 one W-2 for 2008, is that right?

10 A. We looked for all of the documents that you requested.

11 Q. But is it correct that there was a W-2 issued to your
12 father from both entities for 2008, you just could not find one
13 of them?

14 A. We looked for whatever we could find. I don't -- I gave
15 you what we had or what he had.

16 Q. Okay. So let's look at what you gave us for your father.
17 Let's go to Exhibit 2008 -- I'm sorry, blah, blah. Let's go to
18 I believe it is page 2 of Exhibit 28.

19 A VOICE: Two eight?

20 MR. BROOK: Yes. In the middle there at the top.

21 Q. So we can see that there is a payment recognized from
22 Eber-Connecticut only, is that right?

23 A. It says Eber-Connecticut, yes.

24 Q. And you looked for one from Eber Wine & Liquor and you
25 could not find one, correct?

L9L2Kle2

W. Eber - Cross

1 A. This is from 2008. Is this from --

2 Q. Yeah. Ali, can you zoom in not quite as much, please. Get
3 the whole thing there.

4 All right. So looking at the amount, \$189,788,
5 inclusive of I guess that's everything, does that seem like the
6 correct amount of money that your father was paid in calendar
7 year 2008?

8 A. From Eber-Connecticut, yes.

9 Q. And based on that amount, is it fair to infer that there
10 was an amount that was paid to your father from Eber Wine &
11 Liquor just as there was for you?

12 MR. SANTORO: Objection, your Honor.

13 THE COURT: Overruled.

14 A. I gave you what we -- I mean, did you go back to his tax
15 return? Because I think we gave you the tax return, too.

16 Q. Isn't it true that your father did not reduce the amount
17 that he was paid until the last quarter of 2009 or thereabouts,
18 last quarter of fiscal 2009, so in calendar year 2009?

19 A. I don't recall the exact dates. I know he did take some --
20 he did take pay cuts and reduced his salary. You know, it is
21 hard for me to know exactly when that happened, but . . .

22 Q. Just so we can be clear here and don't lose a lot of
23 money --

24 A. I know in 2012 he did. But part of that could be that this
25 is a W-2, you know, covering, you know, January to December,

L9L2Kle2

W. Eber - Cross

1 whereas our fiscal year, like we said, was June to May, so
2 maybe he took it later on or in a different -- like the time
3 periods didn't exactly correspond. So unless you are looking
4 at like apples to apples --

5 Q. Let's take a look at what you said to the IRS. Let's go
6 back to Exhibit 267 at page 279. Let's blow up the first few
7 lines of the last paragraph.

8 Do you see there it says, "During the last fiscal
9 quarter of fiscal year 2009, Eber-Connecticut decreased its
10 expenses by more than \$1 million"?

11 A. No, I don't --

12 Q. "These cost cutting measures included downsizing the sales
13 management team and" --

14 THE COURT: Counselor?

15 MR. BROOK: Sorry. You can read, I guess.

16 THE COURT: You are a 45 r.p.m. record, if anybody
17 knows what that is, being played at 78 r.p.m.s.

18 BY MR. BROOK:

19 Q. All right. So looking at the third sentence, after talking
20 about reducing executive compensation, it says, "Indeed,
21 Mr. Eber has agreed to decrease his annual compensation by
22 \$150,000 to an amount equal to \$186,675." And then it says
23 that the benefit will be recognized during physical year 2010.
24 Do you see that?

25 A. So our fiscal year 2010, the company's fiscal year 2010.

L9L2Kle2

W. Eber - Cross

1 So it -- yeah. Is that what --

2 Q. Just so we are clear, the last fiscal quarter of fiscal
3 2009, we are talking about the months of March, April, and May
4 2009, so after 2008, correct, when is the last fiscal quarter
5 of your year? What months does that encompass?

6 A. March, April, May.

7 Q. Okay.

8 Let's also look, just to try to close this, Exhibit
9 142, interrogatory response number 1, do you see that the
10 second line there says that in identifying all of the sources
11 of income, he was paid by Eber Brothers, Southern Wine &
12 Spirits and Eber-Connecticut in 2008?

13 A. Yes.

14 Q. All right. And now let's go to Exhibit 160 at page 81 and
15 let's blow up count 40 to 80, third one down. No, no, above
16 that. And if you are able to make that more readable, that
17 would be great.

18 So we are again looking at the general ledger for Eber
19 Wine & Liquor, and this is the count covering officers'
20 salaries. Do you see that?

21 A. So this is -- yes.

22 Q. And the officers of Eber Brothers at this point, after --
23 it starts August 30 -- let me pull back.

24 This starts August 2007, correct?

25 A. Yes.

L9L2Kle2

W. Eber - Cross

1 Q. And it goes through June 2008, correct?

2 A. Yes.

3 Q. And the officers of Eber Wine & Liquor were you and your
4 father, is that correct?

5 A. Yes, and it may have included administrative assistant. I
6 don't know. I mean, I'm -- I didn't put this together. I
7 wasn't doing payroll. So there could have been other people
8 involved in this. I don't know.

9 Q. Well --

10 A. I don't know exactly who this covers, so.

11 Q. We will stipulate that there are other payroll expenses on
12 this general ledger. I am just referring to officers.

13 Putting aside this exhibit, who were the officers of
14 Eber Brothers Wine & Liquor during this time period?

15 A. My father and myself. But I don't know if this didn't also
16 include other people as well because there were some other
17 people.

18 THE COURT: So if they included other people, then the
19 description of the account is incorrect, is that right?

20 THE WITNESS: It could be, yes.

21 THE COURT: Well, no, if they included somebody who
22 wasn't an officer, then it was not an accurate account
23 description, right.

24 THE WITNESS: Yes, right.

25 THE COURT: And if the contract description was

L9L2Kle2

W. Eber - Cross

1 accurate and adhered to, it doesn't include anybody else,
2 right?

3 THE WITNESS: Right.

4 THE COURT: Okay. We don't have to worry about the
5 New York Mets' payroll being in here.

6 MR. BROOK: Ali, I believe we have prepared a
7 demonstrative to try to combine the information we have looked
8 at. This is defense -- I'm sorry, not defense. It's
9 Demonstrative 01, D01. This is combining what we have just
10 looked at. You can zoom in on that.

11 Q. So the information that we were just looking at on page 81
12 shows a total of \$204,661 in officers' salaries, and that's net
13 of any credits.

14 And if you can go to the next part, Ali, just show the
15 whole thing, I don't think there is a need to zoom here, and
16 then it says the amount you were paid in 2008, we were just
17 looking at this, was \$50,834, meaning there is \$153,000 and
18 change that is unaccounted for. Does that not sound right to
19 you?

20 A. You said -- sorry?

21 Q. Does that math sound right to you?

22 A. Yes, the math.

23 Q. So combining that amount with the under \$200,000 that your
24 father was paid from Eber-Connecticut, does that sound like
25 approximately the right amount for his salary in 2008, roughly

L9L2Kle2

W. Eber - Cross

1 \$350,000?

2 A. I don't know offhand. I don't know these numbers offhand.
3 Because there were other employees there as well.

4 Q. Well, I guess let's do one thing just to clean this up. It
5 actually just occurred to me. Ali, can you go back to Exhibit
6 267 at page 275. So actually this lists -- even though Mike
7 Gumaer was only a director not an officer, correct?

8 A. Sorry?

9 Q. Mike Gumaer, Elliot Mike Gumaer, he was a director of Eber
10 Brothers?

11 A. Yes.

12 Q. He was not technically an officer, correct?

13 A. Correct.

14 Q. But it says here that he was paid \$22,000 a year for the
15 years ending in 2008 and 2009, correct?

16 A. Correct.

17 Q. Is that a yes?

18 A. Correct.

19 Q. So if we were to -- I'm not going to do it on the fly, but
20 if you subtract \$22,000 from roughly \$150,000, you end up with,
21 what is it, \$128,000?

22 A. Yes.

23 Q. I'm sorry, \$328,000 if you -- I have gotten myself
24 completely confused. Please allow me to start that over again.

25 So looking on the right side of the screen right now,

L9L2Kle2

W. Eber - Cross

1 we see that the reported salary for Lester Eber was \$336,675,
2 correct?

3 A. In 2006.

4 Q. And in 2007, correct?

5 A. Yes.

6 Q. And then what we were looking at before showed that, in
7 2008, Eber-Connecticut paid your father \$189,000 and change, so
8 he got about 190?

9 THE COURT: Sorry. Was that from --

10 Q. Sorry. Let's go back to Exhibit 28, page 2. Okay.

11 You see it is 189,788, so let's call that \$190,000,
12 okay?

13 A. Yes.

14 Q. Then let's go back to Demonstrative 1, and we can see that
15 the difference was roughly \$154,000. So if we subtract \$22,000
16 from Mike Gumaer, we end up with 132, which if we add to
17 \$190,000 ends up being 2 -- sorry, 322,000. Does that sound
18 about right?

19 MR. SANTORO: Objection, your Honor.

20 A. I can't follow.

21 MR. SANTORO: To the extent that he is asking the
22 witness to perform a mathematical calculation, I don't know the
23 relevance.

24 THE COURT: Overruled.

25 A. So can you repeat the question?

L9L2Kle2

W. Eber - Cross

1 Q. Sure. So we saw Lester was typically getting -- let's
2 forget what he was typically being paid.

3 He was being paid \$190,000 by Eber-Connecticut in
4 2008, correct?

5 A. Yes. He was paid -- I thought it was 180-something.

6 Q. \$189,000 and change.

7 A. All right.

8 Q. Let's call it 190. We will subtract elsewhere to make sure
9 it's tare. Let's say according to this it was \$153,000, we
10 will round down, is the difference between what you were paid
11 and what was unaccounted for in the general ledger.

12 A. Yes, but I don't know if there were other salaries included
13 in this or if it was just Lester.

14 THE COURT: We have run that track a few times
15 already.

16 THE WITNESS: Okay.

17 Q. So if we take another step here, it's not on the screen,
18 maybe we can, and we subtract 22, we subtract 22,000, we end up
19 with, what is it, let's call it -- let's round down, 131,000.

20 A. Okay.

21 Q. Which if we then add that to the \$190,000 that we round
22 that up to, we end up with \$321,000, correct?

23 A. Yes.

24 Q. That is approximately the exact same amount that Lester
25 Eber was paid in calendar years 2006 and 2007. Pull up Exhibit

L9L2Kle2

W. Eber - Cross

1 2000 -- sorry Exhibit 28, pages 1 and 2. Nope. Not that one,
2 left one.

3 So that year, with his 401K, it says he was paid three
4 hundred eighteen five. That was very close to what we just
5 calculated if we consider the officers as including Mike
6 Gumaer, correct?

7 A. Yes.

8 (Continued on next page)

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L9LsKLE3

Cross - W. Eber

1 BY MR. BROOK:

2 Q. And isn't it true that there was, in addition to what was
3 reported on a W-2 for 401(k) contributions, that Eber Brothers
4 did 401(k) matching?

5 A. It did do some matching, yes.

6 Q. OK. Would that explain the difference between the amount
7 reported here on the W-2 and the amount that you reported to
8 the IRS on Exhibit -- you can put it up -- 267, page 275?

9 A. I don't know.

10 Q. You don't know?

11 A. I don't know.

12 MR. BROOK: OK. We can move on to something else.

13 Let's take this down, Ali.

14 Q. Now, isn't it true that right at the end of August 2007,
15 your father had Lisa Semenik, the CFO, at that time, change the
16 company's pension plan to allow him to start receiving his
17 pension?

18 A. I don't quite recall. There may have been something done,
19 but I'm not sure when he started receiving his pension.

20 Q. But you do remember he started receiving his pension before
21 he quit Eber Brothers, correct?

22 A. I don't remember. I mean, I wasn't involved in that.

23 Q. Take a look at Plaintiffs' Exhibit 162.

24 You recognize the name Lisa Semenik at the bottom?

25 A. Yes.

L9LsKLE3

Cross - W. Eber

1 Q. And she was the chief financial officer and board member
2 prior to you?

3 A. She was.

4 Q. All right. Then let's look at the amendment. It says
5 Section 5.13. It's the block there in the middle there, Ali.

6 So it says, This is a plan amendment being done --
7 just to look at the date also there, Ali, if you can blow it
8 up -- below it in witness thereof. That's fine.

9 Effective September 1, 2007, do you see that?

10 A. Yes.

11 Q. So that's the point where you say, Eber Brothers Wine &
12 Liquor was done, correct?

13 A. Wait. Can I just read this for a second?

14 Q. Sure.

15 A. OK.

16 Q. All right. So having read this, let's just summarize
17 rather than read. Is it fair to say that this amendment
18 allowed someone who was going to continue working for Eber
19 Brothers Wine & Liquor to start receiving their pension early
20 as long as they had achieved a normal retirement age?

21 A. That's what it says, but it -- you know, the company didn't
22 really have any operations after that point. So I -- you know,
23 I'm not that familiar with exactly what needed to be done. So,
24 you know, I'm assuming she did what --

25 Q. I'm not asking you to assume what she was thinking.

L9LsKLE3

Cross - W. Eber

1 A. OK. You know, I don't -- I don't really know all the
2 details of this. I wasn't involved in it.

3 Q. My question is going to be -- please listen -- were there
4 any other employees of Eber Brothers Wine & Liquor besides your
5 father who were planning to keep working for their employer
6 Eber Wine & Liquor after September 1, 2007?

7 A. I'm sorry.

8 Q. And who had already achieved retirement age?

9 A. Well, I know Mark Shevlin was there too.

10 Q. How long did he continue working for Eber Wine & Liquor
11 after September 1, 2007?

12 A. Well, he was in HR. I don't remember exactly.

13 Q. Is it correct that when your father began to receive his
14 retirement -- I'm sorry -- his pension payments early, he was
15 paid cash?

16 A. It wasn't early. He was already 70, so I think you qualify
17 when you're 55 or something.

18 Q. All right. So let's say it would have been early before
19 this amendment we're looking at, though, right?

20 A. Well, it would have been, you know, if he was still working
21 for the company. I mean, the company was essentially closed,
22 so ...

23 Q. And --

24 A. You know, I'm not, obviously, a lawyer, so I don't know.

25 Q. I'm not asking you --

L9LsKLE3

Cross - W. Eber

1 What was the amount of your father's pension on a
2 monthly basis?

3 A. I think maybe nine or 10,000, maybe 7,000. I think it was
4 between seven and something. 10,000 maybe.

5 Q. OK. So between seven and 10,000 maybe?

6 A. Perhaps. I don't recall the exact amount. I know that the
7 plan was frozen, so...

8 Q. So the amounts didn't change, is that your understanding?

9 A. Right.

10 Q. Let's pull up Defense Exhibit DDDD. 4Ds.

11 Ali, it's the wrong exhibit. There you go. It's hard
12 to read this scan. This is one that we just got less than two
13 weeks ago. Can you zoom in on that first e-mail? I think it's
14 in there.

15 All right. I'm going to try to read this because it
16 is nearly illegible, at least part of it. Correct me if you
17 think I'm saying anything wrong, Ms. Eber.

18 Is this e-mail from Michael Gallagher copying you,
19 correct?

20 A. Yes.

21 Q. It's copying someone from *groom.com*, correct?

22 A. Yes.

23 Q. Those were your lawyers in connection with the dispute with
24 PBGC, correct?

25 A. Yes.

L9LsKLE3

Cross - W. Eber

1 Q. Some of the lawyers?

2 A. The lawyers.

3 Q. And it says here in the middle paragraph, also Michael
4 Gallagher was the actuary for your plan, is that right?

5 A. Yes.

6 Q. So he kept track of what each person was entitled to
7 receive, is that fair?

8 A. Well, he was involved in calculating -- you know, he worked
9 with the company and he was involved in calculating the
10 benefits. Mark Shevlin also worked for the company in human
11 resources, and he also kept track of, you know, benefits.

12 Q. OK. So let's see. So he says here, Lester's current
13 benefit -- this is in 2014 -- is \$10,860 a month payable as a
14 50 percent J and S benefit.

15 Do you know what that means?

16 A. Yeah. It means joint and survivor benefit, so a part of
17 that would be for my mother.

18 Q. If he died, correct?

19 A. If he died and if he actually got the benefit. I mean, he
20 ended up waiving it.

21 Q. Right. But according to this, the last part of this
22 highlighted section says the benefit started on September 1,
23 2007.

24 Do you see that?

25 A. Yes.

L9LsKLE3

Cross - W. Eber

1 Q. You don't have any reason to believe that Mr. Gallagher was
2 providing you with incorrect information?

3 A. No.

4 Q. You can take that down.

5 For most of his career, isn't it true your father, to
6 the best of your knowledge, did not have any written employment
7 agreement with any of his companies?

8 A. I wasn't aware of -- you know, I came into Eber Brothers in
9 20 -- you know, August, September of 2007. So I don't know
10 what he had.

11 Q. So that is why when I asked you during your deposition
12 whether your father had ever had a written employment
13 agreement, you said there may have been, but you don't
14 remember, is that right?

15 A. I don't recall exactly what I said during the deposition,
16 but, you know ...

17 Q. It's correct, is it not, that in April 2012 you granted
18 your father an employment agreement with Eber-Connecticut?

19 A. Yes. He did have an employment agreement with
20 Eber-Connecticut.

21 Q. Let's pull that up. It's Exhibit 180. Flip to the last
22 page.

23 You were the one who authorized this on behalf of
24 Eber-Connecticut?

25 A. And I believe it was -- yes, and I believe it was approved

L9LsKLE3

Cross - W. Eber

1 by the board.

2 Q. And you have no documentary evidence that shows it was ever
3 approved by the board, do you?

4 A. I believe it was.

5 THE COURT: Could you please answer the question you
6 were asked, Ms. Eber?

7 A. I -- sitting here, I don't know.

8 Q. OK.

9 A. But I assume it was.

10 THE COURT: But what?

11 THE WITNESS: I assume it was approved by the board.
12 I'm not looking at the document right now.

13 Q. Is it correct that this is not a document that you
14 disclosed to me when I asked you about employment agreements
15 when I was deposing you as Eber-Connecticut's corporate
16 representative?

17 A. I provided the information the attorneys said that I needed
18 to provide. So I gave whatever they -- you know, whatever they
19 requested, I gave to them.

20 Q. You did give me a copy or me and my clients a copy of your
21 own employment agreement dated August 2012, correct?

22 A. If you requested it, I gave it to you, yes.

23 Q. Not any more than this document, but I shouldn't be
24 testifying, so ...

25 Is it correct that as a result of this employment

L9LsKLE3

Cross - W. Eber

1 agreement, Exhibit 180, after Lester passed away last year, his
2 estate received a deferred compensation amount of three times
3 his salary and bonus?

4 A. Yes.

5 Q. Have there been any other payments to his estate since he
6 died?

7 A. No.

8 Q. I want to focus you on the first page, the section one
9 positions and duties.

10 We can blow up that whole thing, both A and B, Ali.

11 THE COURT: Counselor, just a point of information.
12 Is Lester Eber's will in evidence?

13 MR. BROOK: It has been offered and it has been
14 objected to, your Honor. I contend it goes to motive and bias.
15 The defense has their objection, I believe, on relevance
16 grounds.

17 THE COURT: Why isn't that so -- why isn't it relevant
18 on motive and bias?

19 MR. SANTORO: On motive and bias as to whom?

20 I'm not sure I understand.

21 THE COURT: For one thing, this witness, possibly --

22 MR. SANTORO: We don't think it is relevant to the
23 issues presented and the motive and bias of this witness. I
24 still don't connect it.

25 THE COURT: That's a really rather remarkable

L9LsKLE3

Cross - W. Eber

1 statement.

2 MR. BROOK: Why don't we go to that will and take a
3 quick look at that.

4 THE COURT: Yes. Let's do that.

5 MR. BROOK: Exhibit 175, please.

6 We don't need that first part. Zoom out, actually. I
7 don't know this document like the back of my hand because we
8 only got it recently.

9 Let's go to the fifth section.

10 BY MR. BROOK:

11 Q. So this is the part where your father said, I give and
12 bequeath all of my business interests of any kind and where so
13 ever situate -- situated, I assume -- including stock in Eber
14 Brothers Wine & Liquor, Metro Inc., Eber-Connecticut LLC,
15 Slocum & Sons, and Alexbay LLC, or any other business entity
16 I am involved with at the time of my death, to my daughter,
17 Wendy Eber.

18 So did I read this correctly, Ms. Eber?

19 A. Yes.

20 Q. And you do have a brother, do you not, David Eber?

21 A. I do.

22 Q. And he was entitled to receive an equal share of everything
23 else under your father's will as you, correct?

24 A. Yes.

25 Q. And your brother was also, he was involved in the Wine &

L9Lskle3

Cross - W. Eber

1 Liquor for most of his life, was he not?

2 MR. SANTORO: Objection, your Honor, relevance.

3 THE COURT: Sustained.

4 Now, I hope this isn't a sensitive subject, but is the
5 witness's mother still with us?

6 MR. SANTORO: She's in the courtroom, your Honor.

7 THE COURT: Very much so.

8 Is her will in evidence?

9 MR. BROOK: Her will is not in evidence, and I do
10 believe -- all I can say is this. Their are separate lawyers
11 for my clients representing them in the estate matter. My
12 understanding is that Lester's will requested that his
13 ex-spouse or his widow forego her one third election under
14 New York law. I believe the last thing I heard from those
15 attorneys is that she is making her one third election. There
16 is some question as to exactly where that goes. It is beyond
17 my knowledge and expertise.

18 THE COURT: I'm sorry?

19 MR. BROOK: All that estate stuff, spouse's one third
20 election is well beyond anything I can speak to intelligibly.

21 THE COURT: The question that might be useful to
22 address is whether the witness also had an interest in the
23 deferred compensation that was paid pursuant to the employment
24 agreement with Lester Eber and Eber-Connecticut.

25 MR. BROOK: If we pull that back.

L9LsKLE3

Cross - W. Eber

1 Q. I mean, I think, correct me if I'm wrong, Ms. Eber, you're
2 the executor of your father's estate, correct?

3 A. I am.

4 Q. And as far as the -- I want to call it golden parachute,
5 what do you call it -- the deferred compensation that he was
6 paid after he died, is that how you refer to it?

7 A. Death benefit?

8 Q. The death benefit.

9 Are you treating that as executor as part of your
10 father's business interest or part of his residuary estate?

11 MR. SANTORO: Objection, your Honor.

12 THE COURT: Overruled.

13 A. I believe it is part of the residuary.

14 THE COURT: I'm sorry. You believe?

15 THE WITNESS: It is part of the residuary.

16 THE COURT: The question was: How you are treating it
17 in your role as executor of the estate?

18 THE WITNESS: As residuary.

19 THE COURT: All right. Thank you.

20 BY MR. BROOK:

21 Q. Depending on whether your mother takes an election or not,
22 you would get between one third and one half of that amount
23 that was paid to your father as a death benefit, correct?

24 A. It depends if there is anything left. I mean, if --

25 Q. Right. I mean, I'm assuming that this lawsuit didn't

L9LsKLE3

Cross - W. Eber

1 exist?

2 A. I mean, there is legal fees, there's, you know ...

3 Q. OK. Let's go back to Exhibit 180. Let's zoom in on that
4 section one, positions and duties.

5 Just so we're not playing unfair here, this is not a
6 document that you personally drafted, correct?

7 A. I'm sorry. Which document is this?

8 Q. Is this the employment agreement you signed in April 2012
9 for your father?

10 A. Yes.

11 Q. OK. As position and duties, let me step back.

12 One of the things you testified about in your
13 statements is what different kinds of compensation arrangements
14 and contracts are reasonable and customary in your opinion,
15 correct?

16 A. I believe so, yes.

17 Q. OK. So the first paragraph here states that your father
18 would be employed as chief executive officer of the company and
19 that he would report to the board and have duties and
20 responsibilities consistent with that, correct?

21 A. Yes.

22 Q. That's a fairly reasonable and customary description of
23 position and duties, would you agree?

24 A. Yes.

25 Q. And then the very next paragraph is a provision providing

L9LsKLE3

Cross - W. Eber

1 for your father to be indemnified and held harmless under a
2 variety of different circumstances, correct?

3 A. It's in 1(b).

4 Q. Talking about 1(b), yes. This is one of his positions?

5 A. I haven't read it all.

6 Q. All right. And in particular, I want to direct your
7 attention to the last couple of sentences in this.

8 This contract that you gave your father says that any
9 act or failure to act, based upon authority given pursuant to a
10 resolution, duly adopted by the board or based upon the advice
11 of counsel for the company or any affiliate thereof, shall be
12 conclusively presumed to be done, or omitted to be done, by
13 executive in good faith and in the best interest of the company
14 or any affiliate thereof.

15 Just focusing on that sentence, is it also your
16 opinion that that is a reasonable and customary provision in an
17 employment contract?

18 A. This was written by the lawyer, so ...

19 Q. Then the last sentence says, The company agrees that it
20 shall advance expenses to or on behalf of the executive in
21 connection with the company's obligations pursuant to this
22 section.

23 Do you see that?

24 A. Yes, I see that.

25 Q. And has Eber-Connecticut been advancing your father's

L9LsKLE3

Cross - W. Eber

1 expenses in connection with this litigation?

2 A. With this litigation?

3 Q. Yes.

4 THE COURT: I couldn't hear your answer.

5 A. I'm sorry, no. Bankrupt the company.

6 Q. In the event that your father is held liable in any regard,
7 is it your intention to make a payment to his estate equal to
8 the amount of his liability pursuant to this section?

9 MR. SANTORO: Objection, your Honor.

10 THE COURT: Grounds?

11 MR. SANTORO: Speculation and relevance.

12 THE COURT: I think it is appropriate. If she has an
13 intention, she will tell us. If not, she won't.

14 A. What was the question? Can you just repeat the question?
15 I'm a little confused.

16 THE COURT: Repeat the question.

17 BY MR. BROOK:

18 Q. Is it your intention, either in your capacity as
19 executor -- let me break this up into two separate parts.

20 In your capacity as executor of Lester Eber's estate,
21 is it your intention to seek indemnification for any
22 liability he receives in this case pursuant to this employment
23 contract?

24 A. You mean the legal fees?

25 Q. Legal fees or liability.

L9LsKLE3

Cross - W. Eber

1 A. I mean --

2 Q. Damages.

3 A. I'm sorry. I'm not -- can you just explain to me again?

4 Q. Do you know what indemnification is?

5 A. Yes.

6 Q. OK. So is it your intention, as executor of Lester Eber's
7 estate, to seek indemnification from Eber-Connecticut for any
8 legal fees or damages that are incurred as a result of this
9 litigation we're in right now?

10 A. Well, no. I mean, I --

11 Q. Is that no?

12 THE COURT: Ms. Eber, have you finished your answer?

13 THE WITNESS: I don't know. You know, I -- right now,
14 the estate is paying the legal fees.

15 Q. Who are the current members of the board of managers of
16 Eber-Connecticut?

17 A. Um, right now the current managers are myself, um, Eric
18 Fry, and Jeff Slocum.

19 Q. Eric Fry is your husband, correct?

20 A. He is.

21 Q. Aren't there supposed to be five managers on the board?

22 A. I don't recall how many.

23 Q. In the past there have been five managers, though, correct?

24 A. Yes.

25 Q. Just make sure I heard you correctly. You said Jeff

L9LsKLE3

Cross - W. Eber

1 Slocum?

2 A. Jeff, I think --

3 Q. There are a number of different Slocums, correct?

4 Until recently, about two years ago, John Slocum was
5 actively working for the business, correct?

6 A. He was working for the business, yes.

7 Q. Was he the general manager?

8 A. He was VP of sales.

9 Q. VP of sales.

10 Who is now the VP of sales?

11 A. We have Owin Conners. Owin Conners.

12 Q. Is there a general manager as well?

13 A. No.

14 Q. Who is the number two person in the company after you?

15 A. Wally Crumb.

16 Q. He's the CFO?

17 A. Yes.

18 Q. Who are the other officers of Eber-Connecticut that you
19 haven't mentioned yet, if any?

20 A. I've mentioned them all.

21 Q. I'm sorry. You really need to speak up.

22 A. You know, Wally Crumb is the CFO.

23 Q. Is there a COO or anything like that?

24 A. He's the CFO and the COO.

25 Q. OK. So if you were to make a request for indemnification

L9LsKLE3

Cross - W. Eber

1 in your capacity as executor of Lester Eber's estate for
2 indemnification, who would decide whether or not to make that
3 payment?

4 MR. SANTORO: Objection, your Honor.

5 THE COURT: Sustained.

6 Q. All right.

7 THE COURT: Are we getting close, counselor?

8 MR. BROOK: Unfortunately not, your Honor. I will try
9 to trim things down.

10 THE COURT: The witness has asked for a break. We'll
11 take ten minutes.

12 MR. BROOK: OK.

13 (Recess)

14 THE COURT: Let's continue.

15 Do try to condense, Mr. Brook.

16 MR. BROOK: I've spent the break crossing things off.

17 THE COURT: Let's continue.

18 MR. BROOK: All right.

19 BY MR. BROOK:

20 Q. Ms. Eber, in your declaration you testify about how, based
21 upon your finance and accounting background, you were generally
22 not optimistic about Eber-Connecticut for a significant period
23 of time, is that right?

24 A. We lost \$7 million. Yes.

25 Q. What period of time specifically are you talking about when

L9LsKLE3

Cross - W. Eber

1 you were not optimistic?

2 A. Well, in my declaration, I think it was from 2006, '7,
3 through 2000 -- you know, it went on. Specifically,
4 Eber-Connecticut lost \$7.2 million, I believe.

5 Q. I'm just asking for the time period. Approximately when is
6 the time period --

7 Let me rephrase it this way. At what point in time
8 did you start to become optimistic about Eber-Connecticut's
9 future?

10 A. Well, I actually did do a discounted cash flow, which I put
11 into the -- my statement.

12 Q. I'm not asking for that.

13 A. Well, but that -- you did ask me, though, about when --

14 THE COURT: He asked you when, Ms. Eber. And this
15 isn't like a political campaign where the candidate's objective
16 is to say something loosely related to a question and then to
17 go on and talk about whatever he wants to talk about. That
18 seems to be the drill.

19 This is an answer to the question and the question was
20 when. And either you have a general idea of when or a
21 particular idea of when or you don't remember or you disagree
22 with the premise that you ever became optimistic, but that's
23 the nature of the answer, something along those lines.

24 A. You know, it was very -- it's very uncertain. I don't
25 think there was specific date at which I know. Just the last

L9LsKLE3

Cross - W. Eber

1 year with COVID, it became -- we had an increase in sales, but
2 it's been a struggle for a long time.

3 Q. All right. Is it fair to say that you were not optimistic
4 until sometime after the calendar year 2012 ended?

5 A. I don't know if I've ever been that optimistic.

6 Q. OK. So that includes April 2012, you were not optimistic
7 about Eber-Connecticut's future?

8 A. Yeah, I was not optimistic.

9 Q. But that's when you gave your father a new employment
10 contract with a death benefit, correct?

11 A. It was in April of 2012.

12 Q. Isn't it true that during the time period of, say, 2009
13 through 2012, you repeatedly expressed optimism about
14 Eber-Connecticut's future to numerous different people and
15 organizations?

16 A. The financial situation of the company was -- it was in
17 financial distress during that time. And I was trying to, you
18 know, make arguments that it would, you know, to the bank,
19 because they were going to leave us and other organizations.
20 But the company itself was going through tremendous financial
21 distress.

22 THE COURT: Ms. Eber, you know, if you think you're
23 helping yourself this way, I suggest you reconsider and just
24 answer the questions. Your lawyer gets a chance on redirect to
25 ask you anything else. But this is going to go on for a long

L9LsKLE3

Cross - W. Eber

1 time if what you do is sidestep all the questions.

2 A. All right. Are you going to ask --

3 MR. BROOK: I think that was a relatively responsive
4 answer, not to disagree.

5 THE COURT: I'm happy for you.

6 Q. Is what you're saying then, is you said something different
7 to banks and others than what you really believed, is that
8 right?

9 A. Well, I -- you know, I was trying to be optimistic with the
10 bank. Yes, yes.

11 Q. All right. So let's look at some of that.

12 The bank we're talking about here is Canandaigua
13 National Bank, or CNB, correct?

14 A. Yes.

15 Q. And they, in addition to being a co-trustee of the trust,
16 they were also the primary lender to Eber-Connecticut from 2007
17 or so until 2017, correct?

18 A. Yes.

19 Q. All right. During that time period, Eber-Connecticut --
20 I'm sorry -- CNB, through Bob Lowenthal as the loan officer,
21 repeatedly expressed his desire to get out of a loan, correct?

22 A. Yes.

23 Q. They wanted you instead to find an asset-based lender who
24 could loan you more money, correct?

25 A. Any lender. They wanted us to find anybody.

L9LsKLE3

Cross - W. Eber

1 Q. But didn't he specifically try to help you find an
2 asset-based one?

3 A. He didn't help me find anyone.

4 Q. Is it fair to say that you repeatedly asked CNB to extend
5 the loans that they were giving you past the early maturity
6 dates?

7 A. We asked for extensions, yes.

8 Q. And you repeatedly got them, too, correct?

9 A. We did get extensions, yes.

10 Q. And isn't it correct that by July of 2011, you told Bob
11 Lowenthal that you were confident that Eber-Connecticut was
12 turning the corner and would be profitable in 2012?

13 A. I don't recall that specific conversation.

14 Q. Exhibit 232, let's look at that last sentence of the first
15 paragraph.

16 Here, in an e-mail to Bob Lowenthal dated July 1,
17 2011, copying your father and attaching some financial
18 information that you didn't produce to us, you said, we are --

19 Can you go back, Ali.

20 You said, We are confident that we are turning the
21 corner and will be profitable in 2012, correct?

22 A. It's written there, but we weren't.

23 Q. So is it your testimony that you were lying to
24 Mr. Lowenthal?

25 A. No. No.

L9LsKLE3

Cross - W. Eber

1 Q. OK. So what you're saying then is that, ultimately,
2 despite the optimism and confidence, there was not a profit
3 realized in 2012, is that right?

4 MR. SANTORO: Objection, your Honor.

5 THE COURT: What's the objection?

6 MR. SANTORO: What she is saying there is what is
7 written on the document.

8 MR. BROOK: I'm asking her to clarify her testimony
9 now.

10 THE COURT: I'll sustain an objection to the form of
11 the question.

12 BY MR. BROOK:

13 Q. So did I understand your answer a moment ago correctly,
14 Ms. Eber, as saying that Eber-Connecticut was not profitable in
15 2012?

16 A. It was not profitable in 2012.

17 Q. OK. But well before the end of 2012, Eber-Connecticut had,
18 in fact, turned the corner and was realizing profits, correct?

19 A. No.

20 Q. Exhibit 250. Actually, we want to go to the third
21 paragraph starting with "I have sent."

22 Keep the whole thing visible, please, Ali.

23 MS. KRAL: No worries.

24 Q. All right. This is an e-mail now from you to Mike Gumaer,
25 the director and co-trustee, copying your father, correct?

L9LsKLE3

Cross - W. Eber

1 A. Yes.

2 Q. It's dated November 19, 2012, correct?

3 A. Yes.

4 Q. And you're apparently attaching an e-mail to Bob Lowenthal
5 of CNB, correct?

6 A. Is there an attachment?

7 Q. I wish there was, but this is how we got it.

8 A. OK.

9 Q. So isn't it correct that you told Mike Gumaer, you know,
10 who's on the board of managers of Eber-Connecticut at the time,
11 correct?

12 A. Yes.

13 Q. You told him you had a stellar October, your profits had
14 increased by 200 percent, and we have turned the corner and the
15 good news is that November continues to be strong.

16 So did I read that correctly?

17 A. You read that correctly.

18 Q. So by --

19 A. January was the problem.

20 Q. We just covered July 2011. You were confident that you
21 were turning the corner, and by November 2012, you had turned
22 the corner, correct?

23 A. I wasn't confident.

24 Q. OK. But right in the middle of that time period is when
25 you agreed to transfer all of Eber-Connecticut that was owned

L9LsKLE3

Cross - W. Eber

1 by the trust out of the trust into your father, correct?

2 MR. SANTORO: Objection, your Honor.

3 THE COURT: Overruled.

4 A. Can you repeat the question?

5 Q. So we were just talking about how things changed during the
6 time period from July 2011 until November 2012. Isn't it true
7 that it was in the middle of that time period that you decided
8 to permit your father to take all the trust's interest in
9 Eber-Connecticut and put it into his own company?

10 A. No.

11 Q. What part of that is incorrect?

12 A. Well, I think it is a complete mischaracterization of --

13 THE COURT: What part of it is incorrect?

14 THE WITNESS: Well, my father -- I mean, my father had
15 loaned millions of dollars into the company, and the company
16 wasn't doing well. The company had sustained many years of
17 losses, many, many years of losses. And so I don't think that
18 this is -- from November 19, 2012, I don't think is accurate of
19 what is going on. You know, he -- he basically -- I mean, it's
20 a -- you know, he did foreclose on loans that he made into the
21 company. But the company had -- was not doing well, and he had
22 put millions and millions of dollars into it.

23 THE COURT: OK. I've heard you.

24 There was a time when you decided to permit your
25 father to take all of the trust's interest in Eber-Connecticut

L9LsKLE3

Cross - W. Eber

1 and put it into his own company; true or false?

2 THE WITNESS: The board did decide to -- yes, we --
3 you know, after we -- yes, it was -- it did go into Alexbay,
4 yes.

5 THE COURT: And at what point in time was that
6 decision made?

7 THE WITNESS: Well, he had millions of dollars of
8 loans --

9 THE COURT: That's not what I asked you. Answer my
10 question, please.

11 THE WITNESS: I'm sorry. Your question is what?

12 THE COURT: When did you make that decision?

13 THE WITNESS: Well, that decision was made with the
14 board. There were multiple phone calls with --

15 THE COURT: I didn't ask about how many phone calls.
16 I didn't ask with whom it was made. I asked when.

17 THE WITNESS: In June. It was --

18 THE COURT: Of what year?

19 THE WITNESS: Of 2012. '12.

20 THE COURT: Thank you.

21 THE WITNESS: So it was -- that's when the board
22 resolution was signed. And he moved against the -- you know,
23 it is March where he filed an action, and the board decided --

24 THE COURT: March of what year?

25 THE WITNESS: 2012.

L9LsKLE3

Cross - W. Eber

1 BY MR. BROOK:

2 Q. OK. Now, let's talk about the loans a little bit before we
3 get into that stuff again.

4 In 2010, you and the board authorized a line of credit
5 note for Lester Eber in the amount of \$1.5 million, correct?

6 A. Can you repeat the question?

7 Q. You authorized a line of credit note for your father to
8 loan up to \$1.5 million to Eber-Metro in approximately February
9 or March of 2010, correct?

10 A. We had been loaning. I think it originally started in
11 2009.

12 Q. I'm just asking when it was authorized.

13 A. When it was -- yeah. Sorry. When it was authorized by the
14 board?

15 Q. It was authorized by the board in approximately, again,
16 February or March of 2010, correct?

17 A. Yes, yes.

18 Q. And is it correct that maturity date on that loan was
19 December 31, 2011?

20 A. Yes. Sorry. When was it?

21 Q. December 31, 2011.

22 A. Yes.

23 Q. That's correct?

24 A. But it started, I think, back in 2009.

25 Q. OK.

L9LsKLE3

Cross - W. Eber

1 A. Original note started in 2009.

2 Q. So you're referring to there was a note that was dated
3 October 2009, and then that note was predicated in February 2010,
4 correct?

5 A. Yes.

6 Q. And at that time in 2010 is when you and the board, with
7 the assistance of Glenn Sturm, approved also granting security
8 for that note in the form of all of the assets held by
9 Eber-Metro, correct?

10 A. Yes. It was loaning a lot of money into the company, yes.

11 Q. And at the same time, approved Eber Wine & Liquor to that
12 note, correct?

13 A. Yes. I think it was a little bit later.

14 Q. Now, isn't it correct that even before the maturity date of
15 December 2011, you were already helping your father try to
16 calculate how much interest was due on his note so that he
17 could engage in foreclosure proceedings?

18 A. He had been loaning a lot of money into the company. It
19 was a very, very risky loan, and he did ask for the amount of
20 the interest and the amount of the loans.

21 Q. And you provided that to him, correct?

22 A. Yes.

23 (Continued on next page)

L9L2Kle4

W. Eber - Cross

1 BY MR. BROOK:

2 Q. And you provided that to his lawyer, David Belt?

3 A. Yes, I did provide that.

4 Q. And as a result of the information you gave them, Lester
5 then, after transferring his interest to a company called
6 Alexbay, made a demand -- let me rephrase that.

7 He made a proposal that he would exchange the debt
8 that he had transferred to Alexbay and make it -- cancel it all
9 out if he received all of Eber-Metro's stock from Eber Wine &
10 Liquor, correct?

11 A. He, January 1, he made a proposal, yes. We discussed it
12 with the board, and yes.

13 Q. I think you are confusing two different dates. You mean
14 January 18 was the proposal, correct?

15 A. Yeah, I believe so, yes.

16 Q. And the 1st, you are referring to February 1st, which is
17 when you had either a phone call or a meeting with Mike Gumaer
18 and your father to discuss his resignation, is that right?

19 A. We had a phone call with him, yes.

20 Q. And it is your testimony that during that phone call on
21 February 1, 2012, it was decided that Lester would resign and
22 you would replace him as president of Eber Brothers Wine &
23 Liquor?

24 A. Yes. Originally it was supposed to be Mike and then it
25 became me.

L9L2Kle4

W. Eber - Cross

1 Q. And so you acknowledge at this point, after having seen the
2 e-mail I showed you at your deposition, that actually initially
3 and for over a month, it was Mike Gumaer who was supposed to be
4 the president after Lester, not you, correct?

5 A. Well, at that meeting then we decided it was going to be
6 me.

7 Q. And that decision was not made until approximately March 12
8 of 2012, correct?

9 A. No, we made the decision February 1, when we had the
10 meeting.

11 Q. Let's just pull up Exhibit 103 and get this over with. All
12 right. I want to go to -- I think it is the second page,
13 please, Ali.

14 All right. So do you see if you look at this e-mail,
15 March 2, at the bottom there, someone from Underberg & Kessler
16 is e-mailing you saying, "Attached is a consent regarding
17 Lester's resignation and the appointment of Mike Gumaer." So
18 do you see that?

19 A. Yes.

20 Q. And do you remember how you responded to that e-mail?

21 A. No.

22 Q. Okay. Pull out -- you didn't say that Mike wasn't going to
23 be the president, did you? You instead asked to put in his
24 formal name. Correct?

25 A. This is what the e-mail says, but I --

L9L2Kle4

W. Eber - Cross

1 Q. Is it -- do you think this e-mail is incorrect?

2 A. I -- what I recall is that Lester resigned on February 1,
3 and that's when we decided, instead of being Mike, it was going
4 to be me. I'm not sure how the -- what this -- why this is --

5 Q. Let's just go to the first page, Ali, and zoom in on the
6 last part there.

7 That shows on page 1 of Exhibit 103 that it was on
8 March 12 that you asked the lawyers to substitute your name for
9 Gumaer's as president, correct?

10 A. Well, that's what this says, March 12, yes. But it was, as
11 I recall it, it was the 1st of February we had the call.

12 Q. You can take that down, Ali.

13 Now, it was on February 21 that your father, through
14 Alexbay, filed a lawsuit against Eber Brothers seeking a
15 judicial declaration that his proposal to take all the assets
16 of Eber Wine & Liquor and Eber-Metro in satisfaction of his
17 debt was commercially reasonable, correct?

18 A. He filed a -- for a judicial decision in Judge Rosenbaum's
19 case, yes.

20 Q. So that was few weeks before the document we were just
21 looking at, correct?

22 A. I believe so, yes.

23 Q. Let's talk about -- actually let me pull back.

24 The law firm Underberg & Kessler is a firm that has
25 represented your companies and your father and you since 2010,

L9L2Kle4

W. Eber - Cross

1 correct?

2 A. I'm not sure exactly when they started representing us, but
3 probably somewhere at that time.

4 Q. Let's just make clear Exhibit 144, page 2, and this is the
5 interrogatory response asking for the dates when Underberg &
6 Kessler -- it's number 16, Ali, all the way down. There you
7 go. This is the dates and engagements for Underberg & Kessler,
8 and do you see there that the first time that --

9 THE COURT: I can read that as well as she can.

10 MR. BROOK: Okay.

11 Q. So --

12 THE COURT: No disrespect, Ms. Eber.

13 Q. I just want -- so, Ms. Eber, does that refresh your
14 recollection that the first time Underberg & Kessler was hired
15 was actually to do estate planning for your father?

16 A. It says that here, yes.

17 Q. And isn't it correct that they did a bunch of other work
18 and listed here before your father's will that we just saw was
19 ultimately signed in 2013.

20 A. What's the question?

21 Q. So the will that was ultimately prepared that gives you all
22 of Lester's business interest was ultimately signed in 2013,
23 correct?

24 A. I'm not sure of the date it was signed.

25 Q. Okay. It's on the Exhibit 175. You can take that down,

L9L2Kle4

W. Eber - Cross

1 Ali.

2 Now, Underberg & Kessler represented Alexbay suing
3 Eber Wine & Liquor, correct?

4 A. Yes.

5 Q. And it did so despite the fact that at the same time it was
6 representing Eber Wine & Liquor in other matters, such as, the
7 Harris Beach dispute, correct?

8 A. We hired independent -- Eber Brothers hired independent
9 counsel during the -- when Judge Rosenbaum's decision was
10 filed. Eber Brothers hired independent counsel.

11 Q. And this is Mr. Marino Fernandez you are referring to?

12 A. Yes.

13 Q. And he was somebody who was referred to you by Underberg &
14 Kessler, correct?

15 A. Yes, he is a Rochester attorney, a small community --

16 Q. In your declaration you referred to him as an experienced
17 corporate business lawyer from Rochester, as independent
18 special counsel, correct?

19 A. I believe so, yes.

20 Q. And you also testified that he provided you with regular
21 advice, is that right?

22 A. We did speak with him. Mike and I did speak with him, yes.

23 Q. And he participated in, for example, a board meeting on or
24 about March 13 to discuss the Alexbay lawsuit.

25 A. He did and multiple phone calls. I was in person. I met

L9L2Kle4

W. Eber - Cross

1 with him in person at that meeting, but then there were
2 multiple phone calls with him and Mike Gumaer.

3 Q. So is it fair to say that Mr. Fernandez did a lot of work
4 to try to make sure that this transaction was fair to Eber
5 Wine & Liquor.

6 A. He was involved in it, yes.

7 Q. And he was ultimately paid for his work by Eber Wine &
8 Liquor, correct?

9 A. You know, part of his -- I don't know all the specifics of
10 how he was paid. I think my father paid for part of it and I
11 think maybe the company may have paid for part of his work. It
12 is -- I don't really know all the specifics.

13 Q. So you think your father, who was suing Eber Brothers to
14 take its assets, may have been paying the bills for your lawyer
15 who was retained as independent special counsel? Is that
16 right?

17 A. The company has no money. There is no money. Wine &
18 Liquor has no money.

19 Q. Well, let's look at what Wine & Liquor paid. Exhibit 160
20 at page 76, the second line from the bottom, and I apologize
21 for the small font.

22 A VOICE: 76?

23 MR. BROOK: 76.

24 Q. So you see, second from the bottom, it says that Marino A.
25 Fernandez, Jr., paid \$586.25 for his experienced corporate

L9L2Kle4

W. Eber - Cross

1 business counsel?

2 A. He was paid more than that.

3 Q. You have no record of any such payments, do you?

4 A. I don't, but my father paid more, paid, paid more than
5 that. He required a retainer. Eber Brothers Wine & Liquor
6 Corp. had no money. It was completely insolvent, along with
7 Eber Wine & Liquor Metro, Inc. They had nothing.

8 Q. Isn't it true that Eber Wine & Liquor paid nearly \$2.5
9 million in legal and accounting fees from the time period of
10 August 2007 through May 2012?

11 A. I don't know exactly what -- I know there were a lot of
12 legal fees paid.

13 Q. If the general ledger reflects legal and accounting
14 expenses of \$2,480,000 and change from that time period, would
15 you have any reason to doubt that that is an accurate
16 reflection of how much in legal and accounting --

17 A. What was the time frame?

18 Q. The time frame of the entire time period covered by this
19 general ledger, I believe it is August 2007 through May 2012,
20 and we can look --

21 A. It could be even more. I mean, my father paid a tremendous
22 amount of legal fees as well. There were lawsuits and
23 liabilities and, you know, the legal fees are sickening.

24 Q. And they were paid by Eber Wine & Liquor, too?

25 A. Wine & Liquor paid legal fees and my father personally

L9L2Kle4

W. Eber - Cross

1 paid --

2 Q. And?

3 A. -- legal fees for the company.

4 Q. And in this case you submitted a demonstrative exhibit, I
5 believe it is Exhibit KKKKK -- five Ks -- in which you -- don't
6 put it up -- in which you identify, what is it, hundreds of
7 thousands or millions of dollars in legal fees that you have
8 compiled together by going through your father's checks to see
9 how much he has paid different law firms, is that right?

10 A. Which exhibit? I know there are exhibits where I did go
11 through his checks and where he did, you know -- it has the
12 Bates number and the specific check where he did pay legal
13 fees, among other liabilities that he paid for the companies,
14 that he personally paid.

15 Q. And isn't it true that none of those checks that you have
16 submitted either to this Court or in discovery show your father
17 paying Marino Fernandez anything.

18 A. He did. I mean, he did. I don't know if we found all the
19 checks or not, but he required a retainer and he definitely was
20 paid.

21 Q. And you have not produced any retainer agreement in this
22 case for Marino Fernandez, have you?

23 A. I don't -- I don't recall.

24 Q. So you don't recall seeing one or is this another
25 unproduced document?

L9L2Kle4

W. Eber - Cross

1 A. I don't --

2 MR. SANTORO: Objection, your Honor.

3 THE COURT: What's the objection?

4 MR. SANTORO: The objection is that there are two
5 options given there when there are a multiplicity of
6 possibilities as to why that document isn't here right now.

7 THE COURT: Sustained as to form.

8 BY MR. BROOK:

9 Q. Do you remember ever seeing a retainer agreement for Marino
10 Fernandez signed by anyone?

11 A. No, no, I don't.

12 Q. Did you search for one?

13 A. We searched for -- whatever the search terms were, we
14 searched for them.

15 THE COURT: Counsel, did anybody seek discovery from
16 this lawyer?

17 MR. BROOK: We could not find him, your Honor. The
18 phone number leads to a Spanish language voice mail and there
19 is no good mailing address for the lawyer, so we did endeavor
20 to try to find this guy.

21 THE COURT: Is he a member of the bar of the State of
22 New York?

23 MR. BROOK: He is. The address -- my associate who
24 used to be with my firm was the one who was primarily tasked
25 with that, and I remember not being able to find much of

L9L2Kle4

W. Eber - Cross

1 anything.

2 But I am actually done with this point, your Honor, I
3 think. It is -- and just so we are clear, one of the reasons
4 that we let that go is that the defense explicitly waived the
5 advice-of-counsel defense in this case.

6 THE COURT: It might have been very interesting to see
7 who paid him.

8 MR. BROOK: Well, we have \$586.25 in Eber Wine &
9 Liquor's general ledger, your Honor.

10 THE COURT: But that comes from the client he
11 allegedly was representing.

12 MR. BROOK: Right. It would certainly be interesting
13 to see if the one who was on the other side paid him a lot of
14 money, too, your Honor, I agree.

15 THE COURT: Okay. We will break for lunch. 2:00.

16 (Luncheon recess)

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W. Eber - Direct

A F T E R N O O N S E S S I O N

2:05 p.m.

THE COURT: Okay. Let's continue.

Mr. Brook.

BY MR. BROOK:

Q. All right. Before we get into more of what happened back then, I would just like to briefly cover the current status of the company to see if there have been any changes in the ownership since the last time we have spoken.

Is it correct that at this moment, Eber-Metro still owns 79 units of Eber-Connecticut?

A. Yes.

Q. And you are going to have to speak up again.

A. I'm sorry, yes.

Q. And is Eber-Metro still 90.9 percent owned by Alexbay?

A. Yes.

Q. And you own 9.1 percent of Eber-Metro, correct?

A. Yes.

Q. And is Alexbay 100 percent owned by the Estate of Lester Eber?

A. Yes.

Q. And do you and Lester's estate together own 100 percent of Slocum of Maine?

A. Yes.

Q. Have any rights of first refusal, preemptive rights, or

L9L2Kle4

W. Eber - Direct

1 call options been granted on any of those companies over the
2 last two years?

3 A. No.

4 Q. When we broke, we were talking a little bit about Marino
5 Fernandez and the time period of March 2012, when the board
6 approved the Alexbay trans-- or correct me if I am wrong, but
7 on March 13, 2012, the board agreed that it would not fight the
8 Alexbay lawsuit, is that correct?

9 A. Correct.

10 Q. That's a yes?

11 A. Yes.

12 Q. All right. And participating in that discussion were you,
13 Mike Gumaer, Marino Fernandez, and Lester Eber, is that
14 correct?

15 A. There were more than one conversations, but if you are
16 referring to the -- there was one board meeting, but then there
17 were many conversations after and before that where there were
18 various people in those conversations. My father was not in
19 all of those conversations.

20 Q. But your father was at the one official board meeting that
21 you wrote minutes about, right?

22 A. That's what the minutes say, yes.

23 Q. And you were discussing the lawsuit that he had filed
24 against the company, correct?

25 A. Correct.

L9L2Kle4

W. Eber - Direct

1 Q. And Marino Fernandez was providing you with legal advice
2 with Lester there to listen to it, correct?

3 A. He -- yes, and -- but then I spoke with Mike thereafter
4 many times, you know, thereafter, where Lester was not on the
5 phone.

6 Q. Isn't it true that the day before that board meeting was
7 the first time that Mike Gumaer ever learned about the Alexbay
8 lawsuit?

9 A. He knew that Lester was foreclosing. I don't know if he
10 knew the exact method, but he knew before that.

11 Q. Let's pull up Exhibit 122, and do you see this is an e-mail
12 from Mike Gumaer to you on March 13, 2012, telling you "I am
13 not in a position to discuss in any depth the Alexbay matter as
14 I learned of the matter yesterday afternoon in the e-mail from
15 Underberg"?

16 A. Yes.

17 Q. So does that refresh your recollection as to when he
18 learned about the lawsuit?

19 A. Yes.

20 Q. And you see -- and this is also an e-mail that you recall
21 you and I discussing during your deposition where we agreed
22 that the second to last sentence included a typo, when he wrote
23 "servive," and would you agree with me still that what
24 Mr. Gumaer was saying is that on the surface it looks like
25 Lester is moving against the trust of which he is a co-trustee?

L9L2Kle4

W. Eber - Direct

1 A. That's what it says.

2 THE COURT: I'm so relieved to have had that
3 assistance. I could never, ever have figured it out.

4 Could we move it at a little greater speed than a
5 glacier sliding uphill?

6 MR. BROOK: Yes, your Honor.

7 BY MR. BROOK:

8 Q. And but isn't it true that before that board meeting ever
9 occurred, Marino Fernandez had already agreed to waive all
10 defenses?

11 A. Well, I know that he -- I know that something was filed, I
12 think, on the 9th or something, but Mike was well aware of what
13 was going on. I don't know if -- this was --

14 THE COURT: Ms. Eber, I'm sorry to interrupt again,
15 but this question is I don't think about Mike, unless there are
16 two of them.

17 MR. BROOK: Yeah. I don't think so.

18 THE COURT: Let's pose the question to the witness
19 again and please answer the question that you are asked.

20 BY MR. BROOK:

21 Q. Isn't it true that before the board meeting on March 13,
22 Marino Fernandez had already waived all of Eber Brother Wine &
23 Liquor's defenses to the Alexbay lawsuit?

24 A. I don't --

25 MR. BROOK: Let's put up Exhibit 124.

L9L2Kle4

W. Eber - Direct

1 THE COURT: Could we get the answer first?

2 MR. BROOK: I'm sorry. I thought she actually did.

3 I'm having a hard time hearing her. I thought she did answer.

4 THE COURT: What's the answer to the question,

5 Ms. Eber.

6 THE WITNESS: My understanding is that the lawsuit was
7 just to figure out the commercially reasonableness.

8 THE COURT: Okay. We are going to go back again. You
9 have forgotten the question again.

10 THE WITNESS: So I know that he signed something. I
11 don't know -- I don't know if he had --

12 BY MR. BROOK:

13 Q. Yeah, so what I am showing you now is Exhibit 159. Let's
14 just go to this.

15 A. Yeah, I'm --

16 Q. And do you see that this is the stipulation that was signed
17 by Marino Fernandez on March 9, 2012?

18 A. Yes, yes.

19 Q. And it is correct that you do not have any e-mails or other
20 documents showing that Mike Gumaer was ever apprised of this
21 stipulation or even this lawsuit before the stipulation was
22 filed?

23 A. Well, he knew about it. He knew -- I don't know if he knew
24 about the specific lawsuit. He knew that Lester was moving
25 forward on a foreclosure. I had multiple conversations with

L9L2Kle4

W. Eber - Direct

1 him and my father did as well.

2 Q. Okay. And isn't it correct that after the board meeting on
3 March 13, 2012, Marino Fernandez had no further involvement in
4 this Alexbay matter at all?

5 A. He -- no. There were multiple conversations with him.

6 Q. Isn't it true that at some point Underberg & Kessler began
7 actually preparing Eber Wine & Liquor's own corporate documents
8 to approve this transaction?

9 A. I believe they did, yes.

10 Q. Yes. So, for example, it was Underberg & Kessler who
11 drafted the board authorization to approve this transaction in
12 June 2012, correct?

13 A. I'm not sure.

14 Q. Exhibit 124, please. If you can zoom in on the second part
15 there.

16 Do you see this is an e-mail from someone at
17 Underberg & Kessler to you, Lester Eber, Glenn Sturm, David
18 Belt, and a bunch of other people not named Marino Fernandez?

19 A. Okay, yes.

20 Q. It is attached -- subject is unanimous written consent of
21 board of directors for Eber Brothers Wine & Liquor Corp.,
22 correct?

23 A. Yes.

24 THE COURT: Just go back to that, please.

25 Ms. Eber, do you recognize the name Nelson Mullins

L9L2Kle4

W. Eber - Direct

1 that appears after Glenn Sturm's name in the little at symbol?

2 THE WITNESS: Yes.

3 THE COURT: What is it? Or was it at that time?

4 THE WITNESS: A law firm.

5 THE COURT: Was it a law firm that Mr. Sturm was
6 connected to?

7 THE WITNESS: Yes.

8 THE COURT: Did that law firm ever do any work for
9 your father, for you, or for any of the Eber companies?

10 THE WITNESS: Yes.

11 THE COURT: What kind of work?

12 THE WITNESS: He was a consultant and he did kind of
13 general law work.

14 THE COURT: Was he a consultant on anything other than
15 law work?

16 THE WITNESS: No, he helped with the company as well,
17 as far as strategic.

18 MR. BROOK: I think she means, yes, your Honor, he was
19 consultant beyond law.

20 THE WITNESS: Yes.

21 THE COURT: So what did he do beyond law?

22 THE WITNESS: He helped us -- well, he has a practice
23 where he like strategically helped us with as far as the
24 company had a lot of financial issues, and we were trying to
25 strategically figure out a direction in terms of how to turn it

L9L2Kle4

W. Eber - Direct

1 around, and he helped us with that, as far as doing -- you
2 know, coming in and doing consulting for us with the different
3 members of the team and also helping us with some banking
4 relationships as well.

5 THE COURT: So this is a guy that your companies paid
6 legal fees, is that true?

7 THE WITNESS: We did pay some legal fees to him.

8 THE COURT: And you also paid business consulting
9 fees, yes?

10 THE WITNESS: We may have paid some. I'm -- I don't
11 know how much consulting fees we paid him.

12 THE COURT: Well, he wasn't doing all this consulting
13 and legal work for nothing, right?

14 THE WITNESS: No, he was not.

15 THE COURT: And the people who were paying him was
16 you, your father, and/or the Eber companies, yes?

17 THE WITNESS: Yes.

18 THE COURT: Okay. Let's go on, please. Thank you.

19 MR. BROOK: Okay.

20 BY MR. BROOK:

21 Q. And isn't it true, just to finish up the point, that other
22 Nelson Mullins lawyers were also involved in 2010 at the time
23 of Lester's line of credit note?

24 A. Yes.

25 Q. And those lawyers drafted the line of credit note and

L9L2Kle4

W. Eber - Direct

1 related security agreement and all of that?

2 A. I think Harris Beach was also involved in that.

3 Q. And is it correct that Nelson Mullins -- I'm sorry, that
4 Glenn Sturm actually drafted the April 2010 letters that Lester
5 sent to Sally Kleeberg and Audrey Hays?

6 A. I'm not certain. I believe Mike Gumaer may have helped on
7 those, too.

8 THE COURT: And who is it that Mike Gumaer may have
9 helped.

10 THE WITNESS: Lester on the letters.

11 THE COURT: Thank you.

12 BY MR. BROOK:

13 Q. All right. As the CFO of these different companies and
14 having your finance background, you are familiar with the
15 concept of good will in an acquisition, correct?

16 A. Yes.

17 Q. And so good will is the difference between a purchase price
18 paid and the amount of the assets and the book value of the
19 assets acquired, correct?

20 A. Yes.

21 Q. And do you recall that as of the beginning of 2011, that
22 Eber-Metro had an asset of \$14 million of good will in
23 Eber-Connecticut on its books?

24 A. It may -- I believe so, yes.

25 Q. And is it also correct that in or about early 2012,

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W. Eber - Direct

1 calendar year 2012, you had your accountants write off the good
2 will on Eber-Metro's balance sheet?

3 A. I believe I approved it, yes.

4 Q. So the good will was erased, correct?

5 A. The company had lost like \$7 million, and many -- in over
6 eight years, yeah.

7 Q. So that was a reason to erase another \$14 million asset
8 from the books due to the losses? Is that what you are saying?

9 A. Well, I mean, was it fair? No.

10 Q. Well, at the same time, isn't it true that Eber-Metro on
11 its books had a debt to Eber Brothers Wine & Liquor Corp. of
12 over \$10 million?

13 A. I -- I don't -- I'm not certain of that.

14 Q. Does that sound about correct, though, to you? I don't
15 want to have to go through all the documents.

16 A. I don't remember all the documents, so there may have been
17 some intercompany things, yes.

18 Q. And is it correct that around the same time as the Alexbay
19 transaction, you and/or your accountants erased any debts from
20 Eber-Metro to Eber Wine & Liquor?

21 A. I don't remember the exact details. I mean, I wasn't
22 involved in that, so I don't really recall, but there may have
23 been.

24 Q. Well, who else besides you would have been involved in
25 deciding whether or not to eliminate a debt between Eber-Metro

L9L2Kle4

W. Eber - Direct

1 and Eber Wine & Liquor?

2 A. Probably David Kaplan and the accountants, and Sumner
3 Pearsall, our tax accountant. I'm not sure of all of the tax
4 implications.

5 Q. But there were no other individuals besides you with
6 operational control over the company who could have approved
7 the elimination of a debt, correct?

8 A. At Connecticut, at the Connecticut level, our CFO, if it
9 was Dave Dean, may have been involved as well. I don't --

10 Q. Just so we are clear, I'm talking about Eber-Metro and Eber
11 Wine & Liquor. Do you understand that?

12 A. No, it would have just been me or Lester, yeah, but I don't
13 recall the specific transaction.

14 Q. All right. Let's turn to the pension liability. Now, in
15 your declaration, you emphasize that you thought that this was
16 a very big problem for all of the Eber companies basically from
17 2008 forward. Is that fair?

18 A. It was a big problem, yes.

19 Q. And so you always knew that it was going to have a big
20 potential impact on Eber-Connecticut's business until it was
21 paid or resolved, correct?

22 A. Yes.

23 Q. Isn't it true that you told Bob Lowenthal of Canandaigua
24 National Bank that the pension liability would have no
25 financial impact on the Eber-Connecticut business in February

L9L2Kle4

W. Eber - Direct

1 2010?

2 A. I may have put that in an e-mail, but . . .

3 Q. And if you put that into -- are you not sure? Do you want
4 to look at the e-mail to be sure?

5 A. No, I would have tried to have been positive because I
6 didn't want to lose the loan. Because if we lost the loan,
7 then the company would go under, and we wouldn't be able to
8 survive. So I was trying to be as positive as I could, knowing
9 the severity of the situation.

10 Q. And isn't it also true that, in response to that question,
11 in addition to saying it would have no financial impact, you
12 asked Bob Lowenthal how he heard about the pension liability?

13 A. I don't recall.

14 MR. BROOK: Let's put it up 225.

15 A. I didn't -- I . . .

16 MR. BROOK: Very top.

17 Q. Just looking at the third sentence, you wrote to Bob
18 Lowenthal, copying your father, "While we do not believe that
19 it will have any impact, we discussed the issue internally and
20 wondered how you heard about the matter. Please let us know."

21 Do you see that?

22 A. Yes.

23 Q. So is it fair to say that you yourself had not disclosed
24 this pension issue to Canandaigua National Bank?

25 A. Well, they managed the pension, so they knew.

L9L2Kle4

W. Eber - Direct

1 Q. But they -- is it fair to say you had not disclosed to Bob
2 Lowenthal that whatever the pension issue was might have any
3 relation to its loan to Canandaigua National Bank, correct?

4 A. Can you repeat the question?

5 Q. Let me rephrase.

6 Isn't it true that Canandaigua's loan officer was
7 under the belief that it was only Lester personally who was
8 liable for the pension plan?

9 A. No.

10 MR. SANTORO: Objection, your Honor.

11 THE COURT: It's already been answered.

12 MR. BROOK: Okay. We will let the document speak for
13 itself. You can take that down.

14 THE COURT: Look, I want to understand something,
15 Ms. Eber.

16 THE WITNESS: Yes.

17 THE COURT: You testified a few minutes ago that you
18 always knew that the pension liability was going to have a big
19 potential impact on Eber-Connecticut's business until it was
20 paid or resolved. Was that testimony truthful?

21 THE WITNESS: Yes.

22 THE COURT: Didn't you tell Mr. Lowenthal in 2010, in
23 words or in substance, that you believed that the pension
24 matter would not have any impact on Eber-Connecticut's
25 business? Did you tell him that?

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W. Eber - Direct

1 THE WITNESS: In that e-mail I did.

2 THE COURT: Right.

3 THE WITNESS: Can I --

4 THE COURT: And what you wrote in that e-mail was not
5 true, correct?

6 THE WITNESS: No, I -- can I correct myself? I
7 think -- I always believed that it would have an impact on
8 Metro, Eber-Metro. Connecticut, you know -- I believed it
9 would impact all of the companies, yes. I believed that unless
10 it was resolved, it would have an impact.

11 THE COURT: So the statement you made to Mr. Lowenthal
12 at the time you made it was inaccurate and you knew it was
13 inaccurate, right?

14 THE WITNESS: I -- no, I -- I just -- it was -- I was
15 trying to paint a rosier picture than --

16 THE COURT: I understand that, and when one tries to
17 paint a rosy picture, a rosier picture, to be precise, one is
18 trying to paint a picture that looks rather different from what
19 the picture would look like if it were not rose-colored, isn't
20 that correct? Let me withdraw that because I think it is
21 obvious.

22 You were trying to mislead him. True?

23 THE WITNESS: They managed the pension plan.

24 THE COURT: I didn't ask that. I know they were the
25 trustee, one of three.

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W. Eber - Direct

1 THE WITNESS: Right.

2 THE COURT: I know that. You were trying to mislead
3 Mr. Lowenthal, right?

4 THE WITNESS: I wasn't trying to mislead him. I -- I
5 was hopeful that it wouldn't impact the company.

6 THE COURT: But you said that, your testimony,
7 specifically your testimony, that you always knew it would have
8 an impact was true, namely, that you always knew it would.
9 That's what you said a few minutes ago.

10 THE WITNESS: Well, I always knew that we had to get
11 it resolved with the pension plan, with the PBGC. I always
12 knew that something had to be done to resolve these issues.

13 THE COURT: Go ahead, Mr. Brook.

14 BY MR. BROOK:

15 Q. So the e-mail we were just looking at was February 2010,
16 correct?

17 A. Yes.

18 Q. And it was within about two months of that that you then
19 had Glenn Sturm and/or Elliot Gumaer drafting letters to send
20 to Sally Kleeberg and Audrey Hays asking for money to help
21 Lester with his loans to the company, correct?

22 A. Sorry. Can you repeat the question?

23 Q. Sure. This was just a few weeks before the Lester Eber
24 \$1.5 million line of credit was approved by the board,
25 correct?

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W. Eber - Direct

1 A. Yes.

2 Q. And then that, in turn, was just a few weeks before six
3 percent of Eber-Connecticut was sold from Eber-Metro to a
4 company called Polebridge Bowman owned by Mr. Sturm, correct?

5 A. Sorry, can you repeat the question?

6 Q. Six percent of Eber-Metro --

7 A. Yes, we did.

8 Q. Sorry, sorry Eber-Metro sold six percent of
9 Eber-Connecticut --

10 (Court reporter confers)

11 Q. Eber Connecticut was sold to Polebridge Bowman just a
12 couple of months after the e-mail we were just looking at,
13 correct?

14 A. When was the e-mail that we --

15 Q. I'm sorry. Let me rephrase. Just a few months. It was
16 late May was when it was dated as of, correct? The Polebridge
17 Bowman note.

18 A. Yes.

19 Q. The one where you got the right of first refusal, do you
20 remember that?

21 A. Yes, yes.

22 Q. And do you acknowledge that that transaction was done for
23 the purpose of trying to protect Eber-Connecticut from the
24 pension liability?

25 A. It was done to try to help deconsolidate, yes, out of the

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W. Eber - Direct

1 control group, yes.

2 Q. Okay. So you previously testified that that transaction
3 was done to compensate Glenn Sturm?

4 A. Well, it was both. There were two -- there were two things
5 that -- it was to compensate him, to help turn around the
6 company, so that we could then pay the pension plan and then
7 also --

8 Q. And isn't it true that that six percent was originally
9 intended to be paid or given to you rather than Mr. Sturm?

10 A. Yes.

11 Q. And that was -- so did you receive any additional, you
12 know -- withdrawn.

13 And that six percent, when it was going to be
14 transferred to you, that wasn't something that was ever
15 discussed with the trustees at the trust besides Lester Eber,
16 correct?

17 A. I believe it was discussed with Mike Gumaer.

18 Q. And that was after -- but wasn't the discussion with Mike
19 Gumaer once it was a right of first refusal?

20 A. No, I think we -- Mike was involved in all of these
21 conversations, so it's kind of hard for me to pick, you know,
22 to remember all of the specific details, but he definitely
23 spoke with Glenn and Lester and other attorneys as well.

24 Q. Isn't it true that Mike Gumaer expressed concerns about the
25 fact that a right of first refusal going to you might be a

L9L2Kle4

W. Eber - Direct

1 problem, given the trust?

2 A. Yeah, there is an e-mail on that, yes.

3 Q. And isn't it true that you assuaged Mr. Gumaer's concerns
4 by telling him that it was Eder-Goodman that wanted you to have
5 the right of first refusal rather than giving a right of first
6 refusal to Eber-Metro?

7 A. Originally it was supposed to go, I think, to me and then
8 it -- based on discussions, Lester decided that it would go to
9 Glenn, and that would be for his compensation. And as a result
10 of that, then I got the right of first refusal as far as
11 compensation that was -- I mean, that was part of
12 compensation --

13 Q. My question was about --

14 A. Sorry.

15 Q. -- whether you told Mike Gumaer that Eder-Goodman wanted
16 you to get the right of first refusal. Isn't that what you
17 told Mike Gumaer?

18 A. I don't -- I don't remember telling him that. I may have
19 said that in -- you know, it's -- there is a lot of, like, time
20 that's gone through. I may have testified to that in my
21 deposition, but I don't quite remember.

22 MR. BROOK: Your Honor --

23 A. But they did approve it. They did approve it.

24 MR. BROOK: Your Honor, at this time I would like to
25 play some deposition video. I understand that -- this is from

L9L2Kle4

W. Eber - Direct

1 pages 316/line 7 to 317/15.

2 Q. Your individual deposition.

3 MR. BROOK: Hopefully sound works.

4 PARALEGAL: Hopefully. No, not going through the
5 sound, through the system. I don't know why.

6 THE COURT: Read it.

7 MR. BROOK: Yeah, getting to it now.

8 PARALEGAL: Is it ready now? No, it's muted on the
9 system. How do I unmute?

10 MR. BROOK: I'm just going to read it. So I will read
11 the deposition. Are you able to put it up?

12 PARALEGAL: Let me see if I can get it this time. No,
13 it's not working. I'm sorry. I can put it up on the screen.

14 MR. BROOK: I think that would be good, if you can get
15 to it, so everyone can make sure I am reading it right.

16 A VOICE: What page are you on?

17 MR. BROOK: 316.

18 THE COURT: Please just read it.

19 MR. BROOK: Okay. Line 7.

20 "Q What do you recall about your discussions with Mike and
21 his concerns?

22 "A Well, we discussed that these issues, I did send it to Pat
23 Dalton. As I recall, the six percent, the right of first
24 refusal, we had to have that six percent approved by the
25 partner, and so that's something that they had wanted and then

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W. Eber - Direct

1 we discussed it with the attorneys, and then this is what they
2 came up with. You know, they came out with -- the attorneys
3 came out with what was acceptable to everyone, because there is
4 a couple of groups involved here, and then that was signed off
5 by Mike, and so we did talk about it.

6 "Q What did you say to Mike in response to his questions
7 about whether it would be possible to have Eber-Metro have the
8 right of first refusal?

9 "A I think Eber-Metro does have -- I'm not looking at the
10 document right now, but I do think it does" have it -- "does
11 has like after me."

12 "Q After you, but not the first right of first refusal?

13 "A Right, but I think this is what the partner wanted and
14 this is what was agreed to, so this is what the lawyers --

15 "Q What do you mean by the partner? Who are you referring
16 to?

17 "A Eder-Goodman.

18 "Q So Eder-Goodman, you are saying, wanted you to have the
19 first right of first refusal?

20 "A I think that's what was decided. That was what was
21 decided. That was what the lawyers prepared, and then Mike
22 signed off on it, so he was okay with it."

23 And that was your testimony at the deposition,
24 Ms. Eber, correct?

25 A. I have since looked and reviewed this, and if it had gone

L9L2Kle4

W. Eber - Direct

1 back to Metro --

2 Q. I don't actually have a question pending for you right
3 now.

4 Now, let's just wrap up a little bit with Polebridge
5 Bowman. So is it correct in 2015 Polebridge Bowman's payment
6 in the form of a \$350,000 nonrecourse note was going to come
7 due?

8 A. Yes.

9 Q. And you extended it by one year, correct?

10 A. Correct.

11 Q. And then in 2016, when the note was going to come due
12 again, you extended it this time by ten years, correct?

13 A. Yes.

14 Q. Then in February of 2017, you actually assumed the
15 Polebridge Bowman note and, with it, their six percent interest
16 in Eber-Connecticut, correct?

17 A. He sold it to me.

18 Q. He sold it to you for nothing but the assumption of the
19 debt, correct?

20 A. I assumed the debt, correct. He was in very bad health,
21 yes.

22 Q. And so at the time that you assumed the debt of roughly
23 \$350,000, isn't it true that you already knew that you were
24 expecting a \$150,000 dividend payment from Eber-Connecticut?

25 A. No.

L9L2Kle4

W. Eber - Direct

1 Q. So that wasn't something that was decided at the same time
2 as the Polebridge Bowman transfer?

3 A. Well, he had -- I didn't get the payment. It was -- he had
4 wanted to get out of -- he was in declining health, and he
5 wanted to get out of it, so he sold it to me, and then I --
6 when the distribution -- they were figuring out the
7 distribution of how much the distribution should be, I
8 designated my portion to pay the pension, the legal -- the
9 legal fees, the closing costs, and other -- you know, the vast
10 majority of it, I think it was 100 and -- what did you say? --
11 50 thousand dollars?

12 Q. \$25,000 per unit that was paid, right?

13 A. Right, and then that went to pay the PBGC and the legal
14 closing costs and other Metro costs, expenses of Metro, like
15 legal fees. I did get a small amount, like maybe 10 percent,
16 maybe it was a little more. I can't remember exactly.

17 Q. If we look at Eber-Connecticut's records, we will see a
18 \$150,000 payment to you, though, in the first instance,
19 correct?

20 A. No, no. It went to Metro and directly to State Street Bank
21 to pay down the pension. When we settled with the PBGC for \$2
22 million, Metro and my portion --

23 Q. All right.

24 A. -- directed Connecticut to pay State Street Bank to pay the
25 PBGC, and then the vast majority of the rest of it went to pay

L9L2Kle4

W. Eber - Direct

1 closing costs to the bank and other expenses of Metro, and then
2 I did get a small portion.

3 Q. And as of today, you still owe approximately \$350,000 to
4 Eber-Metro under the note, is that right?

5 A. I don't know. I've got to look. I don't remember exactly.

6 THE COURT: Whether you do or you don't, it's
7 nonrecourse, right?

8 THE WITNESS: Correct. That may have --

9 MR. BROOK: So --

10 THE COURT: Yeah.

11 MR. BROOK: -- I was about to offer to pay \$350,000
12 for it, but that would not be appropriate.

13 BY MR. BROOK:

14 Q. All right. Let's go back.

15 So we talked about how -- the things you said to
16 Canandaigua National Bank, and it is fair to say you tried to
17 paint a rosier picture for PBGC's people, too, in 2011, 2012,
18 or so, correct?

19 A. We were doing the best we could. I was trying to do the
20 best we could to pay them.

21 Q. Now, is it correct that, by the end of October 2011, you
22 were telling PBGC's representative that the company,
23 Eber-Connecticut, does not have any intention of seeking to
24 terminate the pension plan, much less terminate the plan within
25 five years of March 2007?

L9L2Kle4

W. Eber - Direct

1 A. Sorry, could you repeat that.

2 Q. I will step back.

3 Is it not your testimony in your declaration that you
4 believe that the pension plan was terminated in April 2010?

5 A. It was terminated -- it was retroactively terminated to
6 2010, yes.

7 Q. But you fought against that ruling for many, many years,
8 correct?

9 A. We -- we negotiated with the PBGC for many years. I mean,
10 the termination liability was 5.1 plus million, which then
11 there was a termination letter for like \$7.9 million, so it was
12 a long negotiation for many years back and forth.

13 MR. BROOK: Move to strike the termination liability
14 amount in actuarial expert testimony.

15 A. Well, it was in the --

16 THE COURT: It's stricken. The question is whether
17 you fought against the ruling for many years.

18 THE WITNESS: We negotiated for many years, yes.

19 BY MR. BROOK:

20 Q. And you paid, you and your father paid a lot of money to
21 lawyers to fight against having a termination date before June
22 5, 2012, correct?

23 A. We paid lawyers to defend us, yes --

24 Q. And --

25 A. -- and to negotiate.

L9L2Kle4

W. Eber - Direct

1 Q. Is it now your testimony that you always believed that that
2 was a losing battle, and that Eber-Connecticut and Eber-Metro
3 would always be on the hook for the pension?

4 A. Eber-Metro, yes. Well, I mean, yes, that there was a
5 liability out there, and it had to be negotiated and it had to
6 be a negotiated settlement.

7 (Continued on next page)

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L9LsKLE5

Cross - W. Eber

1 BY MR. BROOK:

2 Q. So you would agree then that spending hundreds of thousands
3 of dollars on lawyers was just a waste of money?

4 A. No.

5 Q. You're trying to get this court to give your father credit
6 towards his estate for spending hundreds of thousands of
7 dollars fighting PBGC when you always knew it was a lost cause,
8 isn't that your testimony?9 MR. SANTORO: Objection, your Honor. Mischaracterizes
10 her testimony.

11 THE COURT: Answer the question, please.

12 A. Can you repeat the question?

13 Q. It's harder than it looks.

14 Isn't it true that --

15 Let me take that back. So is it now your testimony --

16 MR. BROOK: Gosh, I've completely lost it, your Honor.
17 Would it be possible to ask the court reporter to read that
18 back?

19 THE COURT: Yes.

20 (Record read)

21 A. No, I -- no, we were trying to negotiate with them, and if
22 they had imposed the 5.1 million or whatever, it just would
23 have -- we wouldn't have been able to survive. It would have
24 simply crushed the company.

25 Q. Let's talk about something else just to try to get through

L9LsKLE5

Cross - W. Eber

1 this.

2 You created a company called Segway LLC, correct?

3 A. Yes.

4 Q. And in 2013, you transferred numerous accounts receivable
5 of Eber Wine & Liquor to Segway, correct?

6 A. I'm not sure of the exact date. There were -- there were a
7 couple of them, yeah.

8 Q. OK. Is it fair to say that you've collected nearly
9 \$200,000, by now more than \$200,000 in money from those
10 accounts?

11 A. No, no, no.

12 Q. All right. Let me ask you this. Have you collected over
13 \$123,000?

14 A. I think it was approximately 123, yes.

15 Q. And then as of a few years ago, you were projecting to
16 potentially collect as much as 70,000 more?

17 A. We never got it.

18 Q. So that was money that you received after 2013, even though
19 Eber Wine & Liquor, you're saying, was already shut down for
20 six years, is that right?

21 A. Those --

22 Should I explain this?

23 Those were receivables that were assigned to the
24 Teamsters. OK. Because we had a, you know, \$2.2 million
25 liability with Teamsters.

L9Lskle5

Cross - W. Eber

1 Q. Ms. Eber, I'm just asking if you did not use Eber Wine &
2 Liquor assets to collect \$120,000, even though it was more than
3 six years after you said the business shut down?

4 A. I paid \$150,000 to settle a case -- I mean, to settle with
5 the Teamsters towards settling the Teamsters --

6 THE COURT: Ms. Eber, we are getting no place fast
7 here --

8 THE WITNESS: OK. Sorry.

9 THE COURT: -- because you just have talking points,
10 and it doesn't matter what question gets asked, you give us
11 your little speeches.

12 THE WITNESS: OK.

13 THE COURT: And you're not helping anybody.

14 THE WITNESS: I'm very sorry.

15 THE COURT: Least of all yourself.

16 THE WITNESS: What's the question? I'm sorry.

17 MR. BROOK: At this point, your Honor, I would
18 actually just like to move on to another topic.

19 THE COURT: Pardon me?

20 MR. BROOK: At this point, I'm just going to move on
21 to another topic. I'm trying to get through this fast.

22 BY MR. BROOK:

23 Q. Let's talk about Harris Beach. That was the law firm that
24 was involved in a lot of these transactions, including the
25 Polebridge transaction, correct?

L9LsKLE5

Cross - W. Eber

1 A. Correct.

2 Q. They sued Eber Wine & Liquor for not paying their bills,
3 correct?

4 A. Correct.

5 Q. And then you counter-sued alleging they committed
6 malpractice by, among other things, failing to submit the
7 litigation claim to insurance, correct?

8 A. Can you repeat the question?

9 Q. Did you not have a counterclaim against Harris Beach?

10 A. I believe so.

11 Q. And isn't it also true that you had defenses against their
12 claims, such as claiming that they over billed?

13 A. I don't recall those counter defenses.

14 Q. All right. Well, I believe --

15 A. I know they did not submit the claim, though.

16 Q. OK. I believe relevant documents are in evidence, and I
17 will not take time to read through those now, but I will ask
18 you this.

19 So the Harris Beach lawsuit was ultimately -- it ended
20 up becoming a fraudulent conveyance lawsuit filed afterwards,
21 correct; they accused you of having fraudulently transferred
22 Eber-Connecticut assets away from Eber Wine & Liquor to
23 Alexbay?

24 A. Yes.

25 Q. That was ultimately discovered by PBGC, correct, the

L9LsKLE5

Cross - W. Eber

1 lawsuit, fraudulent conveyance lawsuit was discovered by PBGC,
2 correct?

3 A. I believe so. I'm not sure.

4 Q. PBGC sued Eber Wine & Liquor to try to change the pension
5 plan termination date, correct?

6 A. No, I don't believe that that's how that worked. I'm not
7 certain, but that's what happened.

8 Q. You were the one who was directing and supervising Eber
9 Wine & Liquor's response to the PBGC lawsuit about the planned
10 termination date, weren't you?

11 A. I'm sorry?

12 Q. Were you not the person at Eber Wine & Liquor who was
13 directing the litigation against PBGC in 2015, 2016?

14 A. Yes, I was.

15 Q. OK. Is it fair to say that during that litigation, PBGC's
16 lawyers relied heavily on the filings that have been made by
17 Harris Beach in their fraudulent conveyance lawsuit?

18 MR. SANTORO: Objection, your Honor.

19 THE COURT: Sustained.

20 Q. In the PBGC litigation, didn't your lawyers not -- let me
21 withdraw that.

22 So the Harris Beach lawsuit litigation, that was
23 ultimately settled where your father paid \$400,000 to Harris
24 Beach, correct?

25 A. Yes.

L9LsKLE5

Cross - W. Eber

1 Q. And as part of that settlement, Eber Wine & Liquor
2 dismissed their counterclaim for malpractice, correct?

3 A. I'm not certain.

4 Q. Isn't it correct that Eber Wine & Liquor gave a full
5 release to Harris Beach as part of that settlement?

6 A. I'm not -- I'm not sure.

7 THE COURT: It's a matter of record?

8 MR. BROOK: It is, but I promise I'm trying to go
9 somewhere and failing.

10 Q. So it's correct, though, that Harris Beach's claims against
11 Eber Wine & Liquor were not dismissed, they were instead bought
12 by your father?

13 A. Yes, that's what they -- that's what they required.

14 Q. Who's they?

15 A. Harris Beach.

16 Q. So you're saying that Harris Beach, who is conveniently not
17 around, is the one that said that they would not dismiss their
18 claims and instead they insisted that your father buy their
19 claims against the company of which he was president, is that
20 right?

21 MR. SANTORO: Objection, your Honor. That question
22 was just answered.

23 THE COURT: No, I don't think so.

24 Overruled. Answer the question, please.

25 A. Yes, I believe so.

L9LsKLE5

Cross - W. Eber

1 Q. And, again, I don't suppose you have anything in writing
2 that would support that testimony, correct?

3 A. No. I don't know. I don't know.

4 Q. And do you consider the amount of \$400,000 that he paid to
5 be nothing but a nuisance to your father, given his wealth?

6 MR. SANTORO: Objection, your Honor.

7 THE COURT: Sustained.

8 Q. Isn't it true that your lawyers in the PBGC case told a
9 federal judge that the Harris Beach litigation was settled for
10 nuisance value and that the claims were dismissed with
11 prejudice on the merits?

12 A. I don't know.

13 Q. If a statement like that was made, that would be untrue,
14 correct?

15 A. I don't understand.

16 MR. SANTORO: Objection, your Honor.

17 THE COURT: Overruled.

18 A. Could you repeat it? I don't understand what you're
19 saying.

20 Q. Sure. Why don't we put it up on the screen so we can see
21 what your lawyers wrote. It is Exhibit 166 at page 11 of the
22 PDF. It's before the bullet points. That's good.

23 MR. SANTORO: 166?

24 MR. BROOK: Yes, 166. This is the reply brief filed
25 by Eber Wine & Liquor's lawyers under Wendy Eber's supervision

L9LsKLE5

Cross - W. Eber

1 in the PBGC litigation.

2 A. Sorry. Can you repeat --

3 Q. Do you see that your lawyer or lawyers represented to the
4 judge in the Western District of New York that the Harris Beach
5 litigation had settled for nuisance value and that the claims
6 were dismissed with prejudice on the merits?

7 A. Does it say the lawyer who made the claims has recently
8 admitted what?

9 Can you --

10 Q. You want to focus on the affidavit that your lawyer signed
11 as part of the settlement, is that right?

12 I'm asking about the sentence before that, Ms. Eber.

13 A. So what are you exactly -- that the litigation recently
14 settled --

15 Q. Do you see that statement that's highlighted there that I
16 just read? Are you with me?

17 A. Yes.

18 Q. And that statement, based on your testimony about Harris
19 Beach insisting that Lester buy the claims, was not true
20 because their claims were not dismissed with prejudice on the
21 merits?

22 A. I -- I'm sorry. It is legal terms I don't understand. I
23 don't understand this. What I'm simply saying is that Harris
24 Beach did require him to settle that way, and that's what my
25 understanding is.

L9LsKLE5

Cross - W. Eber

1 Q. Do you know what the term nuisance value means or is that
2 too legalese for you?

3 A. It was 400,000 that he settled for.

4 Q. And isn't it true that after Lester made that \$400,000
5 payment, you later became the executor of Lester's estate and
6 sought to collect on that claim from Eber Wine & Liquor?

7 A. I believe there was a letter written outlining his claim,
8 yes.

9 Q. And you demanded that -- and you're talking about a letter
10 that you wrote to yourself, right?

11 A. To the estate in the surrogate's court, there was a
12 proceeding that the plaintiffs brought there, and so this was
13 part of that, that letter, yes.

14 Q. This is a letter, if you recall -- and I can put it up if
15 you need your recollection refreshed -- that you wrote as
16 executor of Lester's estate to Eber Wine & Liquor's board,
17 which was you and you alone, correct?

18 A. Yes, there was a letter, but this -- this was what Harris
19 Beach --

20 Q. I only need the yes.

21 Isn't it correct that in that letter, you made a
22 demand of over \$1.7 million from Eber Wine & Liquor because
23 Lester paid \$400,000 to Harris Beach to buy Harris Beach's
24 claim?

25 A. I don't recall the exact amount. I mean, I'm not ...

L9LsKLE5

Cross - W. Eber

1 Q. Let's put Exhibit 400 up, second page, and refresh your
2 recollection. Item three.

3 Further.

4 Do you see that last line there, the estate intends to
5 demand immediate payment of the HB receivable in full, plus
6 accrued interest therein, which amounts to \$1,784,566 as of May
7 last year?

8 A. It was the interest on it. I thought it was on the 400,000
9 and the interest on it.

10 Q. Well, let's look at the last sentence of the first
11 paragraph.

12 A. I know there is an attachment too to it that would have the
13 detail on it.

14 Q. We don't need to go into the detail. We're not offering
15 this into evidence.

16 Are you standing by that demand, do you think that
17 Lester deserves to get paid the full amount that Harris Beach
18 claimed plus interest at 9 to 15 percent?

19 A. It was the 400,000 plus the interest, yes.

20 Q. You think that 400,000 plus interest can be \$1.7 million
21 and you're the CFO of a company?

22 A. I'm sorry. I'm confused.

23 Q. Clearly.

24 Let's go on to another topic.

25 THE COURT: Just so I'm sure I understand, is it your

L9LskLE5

Cross - W. Eber

1 position, Mr. Brook, that this was a way of an attempt to milk
2 assets out of the trust?

3 MR. BROOK: Yes, your Honor. In particular, it was a
4 way to ensure that if and when my clients ever learned about
5 what was happening, that Lester Eber would be able to have a
6 priority over any shareholders of Eber Wine & Liquor by having
7 so much debt interest in Eber Wine & Liquor, no money could
8 ever get to them.

9 In fact, we are seeing these arguments here in this
10 case with the pension and everything else.

11 THE COURT: Thank you.

12 BY MR. BROOK:

13 Q. All right. Now, shortly after this lawsuit was filed in
14 February 2017, the same time when you acquired the Polebridge
15 Bowman 6 percent, you also issued 750 preferred voting shares
16 to Lester. We talked about that earlier, correct?

17 A. Correct.

18 Q. And as part of that transaction, there were a number of
19 different documents that you and Lester both signed, correct?

20 A. I don't recall all the documents.

21 Q. Well, let's take a look at the ones that you produced in
22 discovery before your deposition.

23 Plaintiffs' Exhibit 43. I can give you a hard copy if
24 you need to see it.

25 Does it refresh your recollection that there were a

L9LsKLE5

Cross - W. Eber

1 number of different consents signed in relation to amending the
2 certificate of incorporation and issuing your father preferred
3 shares?

4 You can scroll through the pages, Ali. Perhaps that
5 might help. Just want to make sure we're on the same page that
6 this happened.

7 A. Yes, it -- it -- yes, it did happen. He --

8 Q. OK.

9 A. There was --

10 Q. Again, you signed a number of documents, including at the
11 end -- if you can go to the last page, Ali -- you've got the
12 written consent of the stockholders of Eber Wine & Liquor
13 Corporation, that was something that Lester signed for himself
14 appointing you as a director, correct?

15 A. Yes. Yes, I know that --

16 Q. OK. Yes is all I need.

17 MR. BROOK: If you could, Ali, just real quick zoom in
18 on the Bates number there at the bottom there to make sure we
19 see it.

20 All right. We're in the early stages of the
21 production. 1173 is the Bates number.

22 Q. Then after your first day of your deposition, I deposed you
23 again, and you had produced another written consent form,
24 Exhibit 115, this is one purportedly signed by you as of
25 February 14, 2017.

L9LsKLE5

Cross - W. Eber

1 Do you remember discussing that with me?

2 A. No.

3 Q. Isn't it true that you testified that you don't know why
4 this document wasn't with the other ones?

5 A. I don't remember. I mean, I don't recall all the details
6 of every document.

7 Q. Do you recall that -- you can take that down.

8 Then after discovery was closed, the plaintiffs filed
9 a motion for summary judgment claiming there was one document
10 missing, a shareholder consent form to amending the certificate
11 of incorporation of Eber Brothers Wine & Liquor, which had to
12 be signed by Eber Brothers & Co.

13 Does that ring any bells?

14 A. I don't remember specifically.

15 Q. Do you remember finding another document much later in
16 2019?

17 A. There are so many documents in this case, I don't remember
18 all the documents.

19 Q. OK. Let's pull up Exhibit 270. This is a letter to me
20 dated December 6, 2019, from Paul Keneally. This was your lead
21 counsel before the Farrell Fritz firm became involved, right?

22 A. Yes.

23 Q. And he was also a lawyer who was involved in representing
24 Eber Wine & Liquor all the way back in 2012, correct?

25 A. Under --

L9LsKLE5

Cross - W. Eber

1 THE COURT: Get on with it.

2 MR. BROOK: Sorry.

3 Q. So do you see on the next page that shareholder consent
4 that the plaintiffs had argued was necessary for the
5 transaction to be corporately valid?

6 A. I'm not really familiar with all these documents, so I --

7 Q. All right. So would I be correct in assuming that you
8 cannot tell me today where you found this document after the
9 summary judgment motions were filed?

10 A. I don't remember all the details on all these documents.

11 There is a lot of documents here.

12 Q. And isn't it true that the plaintiffs requested that you
13 find some contemporaneous e-mails or the Word document that
14 produced it to try to show that this document was not something
15 that was a forgery backdated by more than two years?

16 A. No.

17 What's the question?

18 Q. So you never -- you referred earlier to the plaintiffs'
19 request and how you tried to respond to those requests,
20 correct?

21 A. Yes, I -- I --

22 Q. So you were aware of the fact that plaintiffs, after seeing
23 this mysterious find, requested that you and your lawyers go
24 back and find some e-mails showing when it was actually sent or
25 signed or drafted?

L9LsKLE5

Cross - W. Eber

1 MR. SANTORO: I would just object, your Honor, to the
2 characterizations and him asking her to acknowledge things like
3 mysterious and so forth.

4 THE COURT: Overruled.

5 A. I don't -- I don't remember all the details on every single
6 document. There is a lot of documents here. They are in
7 different places and, you know, I --

8 Q. You did remember during your deposition that this document
9 and the other transaction documents were prepared by
10 Mr. Herbert for you, even though he's your personal lawyer and
11 not the company's lawyer, is that right?

12 MR. SANTORO: Objection, your Honor. There is three
13 or four questions in there. I don't know which one he is
14 asking her to acknowledge to.

15 THE COURT: Overruled.

16 Q. Mr. Herbert, you have long insisted, is only yours and
17 Lester's personal lawyer, not the company's lawyer, correct?

18 A. Yes.

19 Q. Yet you also testified Mr. Herbert is the one who drafted
20 the various February 14 and 15, 2017, documents to allow Lester
21 to take a new class of voting preferred shares in Eber Wine &
22 Liquor, correct?

23 A. I believe so, yes.

24 Q. How does Mr. Herbert his documents to you when he wants you
25 to sign them?

L9LsKLE5

Cross - W. Eber

1 A. He -- you know, sometimes he e-mails them. Sometimes he's
2 given me documents. I don't know.

3 Q. Doesn't he live in California?

4 A. Now he does.

5 Q. In 2017, he didn't?

6 A. I don't think so. I think -- I'm not sure when he moved
7 out there. It was recently he moved out there.

8 Q. He's never sent you documents by means like Pony Express or
9 something like that, is that right?

10 A. Not that I recall.

11 Q. OK. Let's look at Exhibit 271 to see what your lawyer said
12 about this. Page eight.

13 It says here, paragraph one, Mr. Herbert has as yet
14 been unable to locate the Word version of the shareholder
15 consent, or any e-mail transmitting it to Ms. Eber in 2017, but
16 will continue to look for them. If they are found, we will
17 provide them to you. The shareholder consent form may have
18 been copied over, and the document may have been given to
19 Ms. Eber other than by e-mail.

20 All right. You can take that down.

21 We'll go to the last topic.

22 THE COURT: Last what?

23 MR. BROOK: Last topic. Actually, maybe on the same
24 exact page, if we need to go to it, Ali.

25 BY MR. BROOK:

L9LsKLE5

Cross - W. Eber

1 Q. When this lawsuit got started and well into discovery, you
2 acknowledge that Eber Wine & Liquor actually had two different
3 shareholders, correct; there was both Eber Brothers & Co. and
4 also the Allen Eber trust had some non-voting shares, is that
5 right?

6 A. I'm not really certain. I know there is a corporate chart.
7 If you have the chart, it's kind of ...

8 MR. BROOK: Sure. Let's look at the chart that you
9 produced in discovery before summary judgment.

10 Plaintiffs' Exhibit 147. It looks like it is at the
11 last page.

12 If you can, zoom in on the bottom half of that,
13 please, Ali, below just everything below the Eber Brothers &
14 Co. Inc. dormant.

15 MS. KRAL: Right here?

16 MR. BROOK: There.

17 BY MR. BROOK:

18 Q. All right. So actually, if we don't count Lester's voting
19 preferred shares issued in 2017, this shows that Eber Brothers
20 & Co. Inc., had 72.7 -- let me withdraw that.

21 These numbers are actually now confusing me. You
22 don't actually put a percentage on this on the right.

23 This chart on the right shows, without a percentage,
24 that there are shares that were held in the name of the Allen
25 Eber trust, correct?

L9LsKLE5

Cross - W. Eber

1 A. Correct.

2 Q. And that was 200 non-voting preferred and 379 non-voting
3 common, correct?

4 A. Correct.

5 Q. And since the end of discovery, you have decided to write
6 those shares off the books of the company, correct?

7 A. No. We -- they never came up on the -- we thought that
8 they got retired. This was something that was kind of handed
9 to me, and I didn't -- we couldn't find these shares. And then
10 when we went to the Canandaigua accounting for the trust, they
11 weren't there either. So it was kind of one -- it was
12 confusing because we thought that they had been retired.

13 Q. But you saw no corporate documents saying these shares had
14 been redeemed or retired, correct?

15 A. There was, like, a stock power or something, either
16 something there that --

17 Q. Well, you did have a stock certificate in your files,
18 Plaintiffs' Exhibit 139.

19 MR. BROOK: Put it up.

20 MS. KRAL: I don't have it.

21 MR. BROOK: You don't have it?

22 MS. KRAL: Hold on. I'll get it.

23 MR. BROOK: May I approach, your Honor, the witness?

24 It's on the exhibit list, I'm sure.

25 MR. MULRY: We just don't have a copy.

L9LsKLE5

Cross - W. Eber

1 BY MR. BROOK:

2 Q. Well, you recognize that as a copy of the certificate
3 issued to the trust that was produced by you and your companies
4 in this litigation, correct?

5 THE COURT: That's not what's on the screen, is it?

6 MR. BROOK: No. I'm sorry, your Honor, for some
7 reason the electronic version of this is not available at the
8 moment. I have an extra hard copy, if your Honor would like.

9 THE COURT: That would be a good idea if you would
10 like me to look at it.

11 MR. BROOK: It's right here.

12 MR. SANTORO: If you wouldn't mind, could I take a
13 quick peak before you hand it up? Thank you.

14 (Counsel confer)

15 MS. KRAL: Your Honor, may I approach?

16 Thank you.

17 BY MR. BROOK:

18 Q. This is something that was produced from your company's
19 files, correct?

20 A. Apparently it was, yes.

21 Q. And nothing on this says that the stock has been canceled
22 or redeemed or anything like that, correct?

23 A. Nothing on this piece of paper does, but I thought there
24 was some kind of stock power. It never showed up on
25 Canandaigua's bank -- on their statement of the trust of Allen

L9LsKLE5

Cross - W. Eber

1 Eber when that estate was settled.

2 Q. So is it your belief that if Canandaigua misplaced the
3 stock certificates, that gives you cause to just erase the
4 stock from the company's books?

5 A. I don't agree with that statement. I don't know if -- I
6 don't know if they existed.

7 Q. You don't know what happened to them period, right?

8 A. Yeah, we couldn't figure --

9 Q. But you just erased them anyway?

10 A. No. I wasn't certain of what was the situation. I didn't
11 know. I don't know.

12 Q. Isn't it true that when the previous bank trustee, M&T
13 Bank, provided its accounting, it did include these shares of
14 Eber Wine & Liquor stock held by the trust on its account?

15 A. Right. And then I think in 2006, they may have been
16 retired, is what my understanding was.

17 THE COURT: Where did you get this understanding?

18 THE WITNESS: I believe I spoke with the lawyer and we
19 couldn't -- when it came to M&T's, or Canandaigua, they didn't
20 have it.

21 THE COURT: What lawyer did you speak to about this?

22 THE WITNESS: John Herbert.

23 So we weren't certain as to what was going on with
24 these actual --

25 THE COURT: So you weren't certain and therefore you

L9LsKLE5

Cross - W. Eber

1 scrubbed them off the books of the company?

2 THE WITNESS: I thought they had been retired is
3 what -- I thought they had been retired.

4 MR. BROOK: No further questions, your Honor.

5 THE COURT: All right. We'll take a short break, and
6 then I hope we're going to wrap this up quickly.

7 (Recess)

8 MR. BROOK: One last thing, your Honor. I wanted to
9 do this before sitting down officially.

10 I would like to offer Exhibits 270 and 271 into
11 evidence. Those were the ones we were looking at involving the
12 missing document, but I'm offering those only conditioned on
13 the court accepting the underlying document in evidence. We
14 made an authenticity objection to that.

15 THE COURT: Remind me what the underlying...

16 MR. BROOK: I can't recall the exhibit. It was
17 compiled with a bunch of other documents.

18 Do you know what the defense exhibit is?

19 THE COURT: You'll file something making this clear --

20 MR. BROOK: Yes.

21 THE COURT: -- and subject to that filing, they are
22 received.

23 (Plaintiff's Exhibits 270 and 271 received in
24 evidence)

25 All right. Redirect.

L9LsKLE5

Redirect - W. Eber

1 REDIRECT EXAMINATION

2 BY MR. SANTORO:

3 Q. How are you doing, Wendy?

4 A. I'm good.

5 Q. All right. On the issue of the shares that we were just
6 talking about towards the end of your direct testimony, do you
7 recall that Canandaigua National Bank filed an accounting,
8 right?

9 A. Yes.

10 MR. SANTORO: Samantha, can we pull up Defendants'
11 Exhibit 0000. If we can go to schedule A of that account.

12 THE COURT: You're going to tell me it's not listed
13 there, right?

14 MR. SANTORO: I'm sorry, Judge?

15 THE COURT: You're going to tell me it's not listed
16 there, the stock?

17 MR. SANTORO: It's not listed there or in the order
18 approving the account, which is Exhibit TTTT.

19 THE COURT: Fine. Next proposition.

20 MR. SANTORO: Very good.

21 BY MR. SANTORO:

22 Q. Wendy, there was a lot of discussion about your
23 communications with Bob Lowenthal and Canandaigua National
24 Bank, right?

25 A. Yes.

L9LsKLE5

Redirect - W. Eber

1 Q. Now, the line of credit -- well, withdrawn.

2 The loan that Eber-Connecticut had with Canandaigua
3 National Bank before 2012, was there a guarantor on that loan?

4 A. Yes.

5 Q. Who was the guarantor?

6 A. My father.

7 Q. Prior to the foreclosure in 2012, did anyone put up any
8 collateral in connection with that loan?

9 A. Yes.

10 Q. Who did so?

11 A. My father.

12 Q. What did he put up in the way of collateral?

13 A. First, he put up a CD for \$500,000, and then when the
14 company did worse, he put up more collateral, I think, between
15 120 and \$150,000.

16 Q. This was all before the foreclosure in 2012, right?

17 A. Yeah, I believe so.

18 Q. OK. Now, when did Eber Wine & Liquor secure its credit
19 facility with Wells Fargo?

20 A. I think it was 2006.

21 Q. OK. What month?

22 A. Was it March, something like that? March.

23 Q. And when were the -- what were the dates of the promissory
24 notes we were looking at earlier?

25 A. I think March.

L9LsKLE5

Redirect - W. Eber

1 Q. Were those promissory notes signed at the same time as the
2 credit facility with Wells Fargo?

3 MR. BROOK: Objection.

4 THE COURT: What's the objection?

5 MR. BROOK: Lack of personal knowledge as to when they
6 were actually signed. We can say when they were dated, but...

7 THE COURT: Sustained.

8 A. I think it was with the same time.

9 THE COURT: Answer is stricken.

10 MR. SANTORO: There is a sustained objection.

11 THE WITNESS: Oh, sorry.

12 BY MR. SANTORO:

13 Q. Now, there was some questions about IRA contributions and
14 matching IRA contributions for Lester's IRA, right, the 401(k),
15 was it?

16 A. Yes.

17 Q. OK. And what happened to Lester's retirement accounts?

18 A. They -- he drained almost all of his retirement accounts to
19 make loans to the company. He gave up his pension plan
20 entirely, and then he paid various liabilities of the company
21 with his 401(k) and his IRA --

22 MR. BROOK: Objection, nonresponsive.

23 THE COURT: Stricken.

24 Let's start again, if you want to get into this and
25 establish personal knowledge.

L9LsKLE5

Redirect - W. Eber

1 THE WITNESS: I do have personal knowledge.

2 THE COURT: I want to hear it.

3 Q. Wendy, you're the executor of your father's estate,
4 correct?

5 A. I am.

6 Q. And in the course of discharging your obligations as
7 executor, have you been through your father's records?

8 A. I have.

9 Q. As part of going through your father's records, have you
10 reviewed his various retirement accounts?

11 A. I --

12 Q. And can you tell me what happened to those retirement
13 accounts?

14 A. Yes.

15 THE COURT: Sustained.

16 Look, you can't do it this way, counselor. You know
17 it. If there are records that show various things, the records
18 are the best evidence. I will not find persuasive attempts to
19 put the rosiest face on whatever the witness thinks she may
20 recall.

21 THE WITNESS: Your Honor --

22 MR. SANTORO: Don't answer.

23 Q. So you were asked about Eber-Metro's \$14 million in
24 goodwill, right?

25 A. Yes.

L9LsKLE5

Redirect - W. Eber

1 Q. You authorized it to be written off the books?

2 A. Yes.

3 Q. And can you tell me at that time what the actual value of
4 that goodwill was?

5 A. Zero.

6 Q. OK. What leads you to that belief?

7 A. The companies were insolvent. There was no value there.

8 Q. Then there was some testimony about receivables that were
9 transferred into Segway LLC, right?

10 A. Yes.

11 Q. And can you tell me why those receivables were received
12 into Segway LLC?

13 A. Yes.

14 Q. Can you please tell me?

15 A. Yes. I paid 100 -- approximately 150 or 160,000 towards
16 the Teamsters withdrawal liability, and because of that, Eber
17 Brothers assigned me these receivables.

18 Q. This payment that you made, what was the source of that
19 \$160,000 that you paid?

20 A. Personal funds.

21 Q. Now, finally there was some discussions about the right of
22 first refusal that you received when Eber-Metro sold six
23 percent of its interest in Connecticut to Polebridge Bowman.

24 Can you give me a complete answer as to your
25 understanding of why you received that right of first refusal?

L9LsKLE5

Redirect - W. Eber

1 A. Yes, because originally it was supposed to be -- it was
2 originally supposed to be six percent that was supposed to be
3 sold to me. It was unable to be sold to me based on Lester
4 having discussions with his attorney and, therefore, it went to
5 Glenn as compensation. And, therefore, I was able to get the
6 right of first refusal.

7 THE COURT: You testified about this earlier. You've
8 said the first reason it went to Glenn was to get it out of the
9 consolidated group.

10 THE WITNESS: Yes.

11 THE COURT: Then you added something about
12 compensating Glenn, and this time you didn't mention getting it
13 out of the consolidated group.

14 THE WITNESS: Yes. Yes, it was. Getting it out of
15 the consolidated group was part of it as well, yes.

16 BY MR. SANTORO:

17 Q. How, to your understanding, did it get it out of the
18 consolidated group?

19 A. Because if the company was out of the control group, it
20 needed to be under 80 percent. And this was part of that, to
21 get it under the 80 percent.

22 Q. So what was given to the PBGC in consideration of the
23 release to the Eber entities?

24 A. We paid them \$2 million and my father gave up his entire --
25 my father and my mother gave up their entire pension benefit,

L9LsKLE5

Redirect - W. Eber

1 which was approximately one point --

2 MR. BROOK: Objection to the amount as being an
3 actuary. She is about to testify to an amount she says this
4 pension give-up was worth based upon actuary opinion, which is
5 expert testimony she is not qualified to give.

6 THE COURT: I'll let you cross about the \$2 million.

7 MR. BROOK: The two million there is no objection to.
8 It is what she is about to say.

9 THE COURT: Two million in cash?

10 MR. BROOK: Two million in cash. And she is about to
11 say how much his pension was worth based on actuary --

12 THE WITNESS: It is joint and several --

13 THE COURT: Are you seeking to elicit that, counsel?

14 MR. SANTORO: Yes, your Honor. Yes.

15 THE COURT: Well, not from this witness.

16 BY MR. SANTORO:

17 Q. OK. Without telling me the amount, can you tell me what,
18 in addition to the cash amount of two million, was given to the
19 PBGC in consideration of a release of its claims to the Eber
20 entities?

21 A. It was the joint and several benefit of my father and my
22 mother from 60 years of working for the Eber Brothers Company,
23 that my father worked for the company.

24 Q. And can you tell me approximately how much in the way of
25 legal fees were spent fighting with the PBGC and negotiating

L9LsKLE5

Redirect - W. Eber

1 with them?

2 A. It's hundreds and hundreds of thousands of dollars. I
3 think it's between, like, five and 800,000, or something to
4 that neighborhood.

5 Q. OK.

6 THE COURT: Do you know what proportion of that was
7 spent out of company funds?

8 THE WITNESS: It's my father.

9 THE COURT: Pardon me?

10 THE WITNESS: My father. My father's personal
11 finances.

12 THE COURT: You're telling me that all the money spent
13 on the PBGC litigation was paid personally by your father, is
14 that what you're telling me?

15 THE WITNESS: Close to all of it, I would assume, yes.
16 Yes.

17 THE COURT: Close to all of it, you would assume.

18 Do you know?

19 THE WITNESS: Yes, yes. He paid -- he paid, I would
20 say, almost all of it. I don't know where any else of it would
21 have come from other than him.

22 THE COURT: So when you say he paid almost of all of
23 it, you are saying that on the basis that you don't know
24 anything else, any other place it came from?

25 THE WITNESS: There was no other money. There was no

L9LsKLE5

Redirect - W. Eber

1 other money to fund.

2 THE COURT: Did you ever see checks?

3 THE WITNESS: Yes, yes.

4 THE COURT: Well, let's just say, counsel, you've only
5 had five years to prepare for this case, and if you can't prove
6 that in some other way, the likelihood that the court is going
7 to credit it is not overwhelming.

8 BY MR. SANTORO:

9 Q. Wendy, as part of your declaration which contains your
10 direct testimony, you've offered into evidence checks that
11 reflect payments to lawyers and other professionals in
12 connection with the PBGC liability, correct?

13 A. Yes.

14 MR. SANTORO: OK. So we will refer to the evidence
15 therein, your Honor.

16 Q. You've added it up on a demonstrative exhibit for the court
17 as well, right?

18 A. I have.

19 MR. SANTORO: OK. Thank you.

20 Thank you, Wendy.

21 Thank you, your Honor.

22 THE COURT: Pardon me?

23 MR. SANTORO: My redirect is finished.

24 Thank you, your Honor.

25 THE COURT: Thank you.

L9LsKLE5

Recross - W. Eber

1 MR. BROOK: Very brief recross.

2 RECROSS EXAMINATION

3 BY MR. BROOK:

4 Q. Let's go with the last thing first.

5 Could you please put you up Exhibit 160. Let's just
6 pick page 76, in the middle of the legal fees section.

7 Do you see there are a number of different line items
8 here showing payments to Groom Law Group on Eber Wine &
9 Liquor's general ledger?

10 A. Yes, I do.

11 Q. Groom Law Group, they weren't representing you in anything
12 other than the dispute with PBGC, were they?

13 A. It was PBGC pension related, yes.

14 Q. OK. And is it correct -- and it's correct that there were
15 no electronic records for Eber Wine & Liquor payments made
16 after May 2012, correct?

17 A. I'm sorry?

18 Q. After May 2012, the goal was to make Eber Wine & Liquor not
19 make payments to anyone else, right?

20 It was supposed to be a dead company, isn't that
21 right?

22 A. I'm -- I'm not certain. Lester put the money into Eber
23 Wine & Liquor for these to be paid.

24 Q. So you're saying that this was only paid because Lester --

25 A. Yes.

L9LsKLE5

Recross - W. Eber

1 Q. -- loaned the money?

2 So he was loaning money to pay the litigation?

3 A. Yes.

4 Q. To fight the pension that the money was also loaned to
5 fund, is that right?

6 A. Yes. He was loaning money in at this time, yes.

7 Q. All right. Now, you said something about, you know, paying
8 \$160,000 of your own personal funds to the Teamsters, is that
9 right?

10 A. Yes.

11 Q. Now, isn't it true that as a general matter, you have
12 not -- the parties have agreed that we wouldn't get into
13 discovery about your personal finances in detail until after a
14 decision was made on punitive damages, correct?

15 A. I don't know.

16 MR. SANTORO: I object, your Honor. I'm not sure --

17 THE COURT: What are you objecting to?

18 MR. SANTORO: I'm not sure what counsel is referring
19 to in terms of an agreement among counsel.

20 MR. BROOK: He's new in the case, your Honor.

21 During discovery, there were objections to requests
22 for Lester and Wendy's personal net worth, which is relative to
23 determining punitive damages under New York law. The parties
24 agreed at the time we were expecting a jury trial to defer
25 discovery until after there was a determination, which is

L9LsKLE5

Recross - W. Eber

1 consistent with a number of case law presence that we saw.

2 But now I would like to ask some questions, because
3 Ms. Eber is advising that she had \$160,000 in personal funds
4 just to pay when that was her entire salary for a year.

5 THE COURT: OK.

6 BY MR. BROOK:

7 Q. So is it fair to say, Ms. Eber, that thanks to your
8 husband, you do not have to spend any of your income on your
9 personal living expenses?

10 MR. SANTORO: Objection, your Honor.

11 THE COURT: Overruled.

12 A. Can you repeat the question?

13 Q. Yes.

14 Isn't it true that thanks to your husband and his
15 wealth, you are not required to spend any of the money that you
16 earn on your personal living expenses?

17 A. No, that's not true.

18 Q. Don't you live in a \$7 million apartment on the Upper West
19 Side?

20 A. No, that's not true.

21 THE COURT: Let's not do this now.

22 MR. BROOK: OK.

23 Q. And is it correct, though, that you have not produced any
24 documents to us showing that you ever personally made a
25 \$160,000 payment to the Teamsters?

L9LsKLE5

Recross - W. Eber

1 A. I -- there was a payment to the Teamsters. So, you know,
2 we have got to go back --

3 Q. As you sit here today, you cannot say that this is
4 something that you have given to your lawyers or to the
5 plaintiffs, correct?

6 A. It was done in one payment with my father and my payment
7 together.

8 MR. BROOK: OK. Nothing further.

9 THE COURT: OK. Thank you.

10 Mr. Santoro?

11 All right. Ms. Eber, you're excused.

12 (Witness excused)

13 Tell me what more there is on the defense case,
14 Mr. Mulry.

15 MR. MULRY: Your Honor, tomorrow the first witness is
16 Michael Gallagher, who is an actuary for the company. You have
17 heard some testimony about him today. He will be appearing
18 remotely, via Microsoft teams, so he would be the first
19 witness. We have spoken with Mr. Mohan to do a trial run at
20 9:15 to make sure that technologically everything is set. We
21 expect him to be a very short witness.

22 And following him would be Frank Torchio, who is the
23 defendants' expert. Just depending on what the cross is for
24 that, I wouldn't know that Mr. Brook can answer that, that
25 would say how much of the day we would need.

L9LsKLE5

Recross - W. Eber

1 THE COURT: That's it?

2 MR. MULRY: Yes. That's correct.

3 THE COURT: OK. So let me give you a heads up in a
4 couple of ways.

5 Depending on how much time is available tomorrow, I
6 would hear closing argument of somewhere not less than 20, no
7 more than 30 minutes on either side. I say not less than. If
8 I run out of time, I run out of time. It could be less than,
9 but I'm thinking 20 to 30.

10 Secondly, because of the volume of paper, I will give
11 you time to submit post-trial briefs. But I'm going to ask you
12 to do it on a short timeframe, because my general practice in
13 nonjury cases is to try to decide them right at the end of the
14 testimony, while everything is fresh in my mind. And every day
15 that goes by makes it harder to bring to mind as much detail as
16 I can immediately after. So I'll try to make it relatively
17 short.

18 Now, the third point I want to make is that, as I
19 remember making clear to whoever the first lawyers in this case
20 were all those years ago, and as I related to you on the first
21 day last week, I put the idea that this litigation would go
22 forward in this family context was something approaching insane
23 and highly destructive and that it should have been settled.
24 And having now heard three full days of testimony and all the
25 testimony of principals who are left to give testimony and have

L9LsKLE5

Recross - W. Eber

1 anything to say, all I can tell you is that I understated my
2 view at the beginning. This case cries out to be resolved, and
3 it can't be resolved if everybody thinks that when the Lord
4 came down from Mount Ararat, they won. It is just wrong. It's
5 got to be someplace in between. And I think there is plenty of
6 reason for each side to understand that if the case goes to a
7 decision, it might be very much worse for their side than they
8 imagine now. And that goes for both of you.

9 I just can't imagine that there are not enough assets
10 and there isn't enough money around to make everybody not
11 whole, not happy, but less unhappy than they are or may well
12 wind up being. And I suggest to you that in whatever the time
13 interval is between a quarter to four this afternoon and when
14 you file your post-trial submissions, you spend most of your
15 time trying to get this resolved.

16 And if it would be useful for me to try to find a
17 magistrate judge who could help you either now or at some point
18 along the road, I will try. As I'm sure you are assuming, the
19 pandemic has put a severe strain on the resources here. The
20 magistrate judges are very busy with the criminal docket, but
21 if I can get one, I will, because I think it is important that
22 if this is going to be resolved, it be resolved.

23 The last thing I'll say is, I was really surprised by
24 a lot of things I heard today and saw here. OK. I will see
25 you all in the morning.

L9LsKLE5

Recross - W. Eber

1 MR. MULRY: Your Honor, on that last point, I don't
2 know if you want a response.

3 We consent to going to a magistrate for settlement.
4 We have proposed that as well as private mediation. If your
5 Honor is willing to do that and plaintiff are willing to do
6 that, we do consent with that.

7 MR. BROOK: We'll try anything. We did meet and, your
8 Honor, I believe, just to correct one thing, your Honor said on
9 the first day, we actually -- your Honor, I believe, had some
10 sort of, like, a dog injury or something.

11 We were going to mediate in front of your Honor. We
12 ended up going in front of Judge Parker. So we did try
13 mediation with her once, maybe twice even. And I have
14 submitted some suggestions that have not been responded to.

15 THE COURT: The dog incident was two years after this
16 case started. One year.

17 MR. BROOK: It was in 2017, if I recall correctly.

18 THE COURT: April 30 at 10:30 in the morning. Not
19 ever to be forgotten.

20 MR. BROOK: That sounds awful. Incidentally the date
21 of the PBGC court. Anyway --

22 THE COURT: All I can tell you is stay away from
23 pit bulls.

24 MR. BROOK: We are certainly open to it. We will give
25 it a try. I just would hesitate because I'm only one person, I

L9LsKLE5

Recross - W. Eber

1 can't be in two different places at once.

2 I would --

3 THE COURT: Look, I understand that.

4 MR. BROOK: If we are anywhere within a range of,
5 like, 90 percent -- like right now it's at more than ten to one
6 difference. So the only hesitation I have is just if I spend
7 two full days trying to work on a settlement, I won't be able
8 to do as good a job on the briefing that is required for your
9 Honor.

10 I am certainly open to it. I would love to give it a
11 try. I do agree, this case is best resolved settled rather
12 than having to deal with an adverse process of trying to pull
13 apart a company. That's not something that me or my clients
14 are looking forward to at all. We planned for it, of course.
15 But there is no way that that goes smoothly and isn't expensive
16 with more lawyers than just me for possibly years to come.

17 THE COURT: Believe me, I understand that. I do
18 understand that. Both I and people in my firm when I was in
19 practice had cases that were some resemblance to this, and
20 every single one was a disaster in all ways except for the
21 firm's income statement. So I know what's involved and it's
22 not good. And at the end of the day, people need to live with
23 each other too. Family is family.

24 (Adjourned to Wednesday, September 22, 2021, at
25 9:30 a.m.)

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